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Facebook "Likes" Are Not Protected Speech Under the First Amendment

May 11, 2012

Bland v. Roberts, 2012 WL 1428198, (E.D. Virginia April 24, 2012).

Six Virginia Sheriff's office employees sued the Sheriff of Hampton, B.J. Roberts, both individually and in his official capacity, after they were fired from their jobs in 2009. Roberts was running for re-election during 2009 and several of the employees allegedly "liked" Roberts' opponent on Facebook. The employees, some civilians and sworn deputies, alleged First Amendment violations claiming that the terminations were linked to the expressions made on Facebook, in violation of their freedom of speech and freedom of association. The Plaintiffs filed their complaint against Roberts on March 4, 2011, and Roberts moved for summary judgment on December 9, 2011.

Plaintiffs Bobby Bland and Debra Woodward were civilian employees working in the Sheriff's office while Plaintiffs Daniel Ray Carter Jr., David Dixon, Robert McCoy, and John Sandhofer were all sworn, uniformed deputies within the Sheriff's office. In their complaint, the Plaintiffs asserted that Roberts' actions in firing them were retaliatory in nature since the "Sheriff learned that a number of his employees were actively supporting Jim Adams, one of the Sheriff's opponents in the election." The Plaintiffs also stated that in addition to "liking" Adams' page on Facebook, they informed others of their support of Adams and attended a social function in which Adams also took part and attended. Roberts ultimately won re-election and decided not to retain the six Plaintiffs, in addition to six other employees. Roberts stated that the non-sworn employees were going to be replaced by sworn deputies and that the other Plaintiffs were dismissed because of poor performance as well as his assertion that their actions while employed "hindered the harmony and efficiency of the office."

In order to prove their claims regarding freedom of speech and freedom of association, the Plaintiffs had to satisfy the elements of the test in *McVey v. Stacy*, 157 F.3d 271 (4th Cir.1998). In that case, the United States Court of Appeals for the Fourth Circuit ("the Fourth Circuit") stated the standard for an adverse employment action which asks:

> *(1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a personal matter of personal interest;*
>
> *(2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public;*

(3) whether the employee's speech was a substantial factor in the employee's termination decision.

Judge Raymond A. Jackson federal District Court held that, as to Carter, McCoy, and Woodard's claims, the Plaintiffs "have not sufficiently alleged that they engaged in expressive speech" simply by posting comments on Adams' Facebook page. Carter's "like" on Facebook was his only alleged support ofAdams. The Court was clear in its interpretation of the "like" in stating that, "the Court will not attempt to infer the actual content of Carter's posts from one click of a button on Adams' Facebook page. For the Court to assume that the Plaintiffs made some specific statement without evidence of such statements is improper. Facebook posts can be considered matters of public concern; however, the Court does not believe Plaintiffs (Carter and McCoy) alleged sufficient speech to garner First Amendment protection." Similarly, the Court held that Plaintiff Dixon did not prove that he touched upon a matter of public concern with his speech.

Despite the fact that public employees can speak as citizens on matters of public concern, Judge Jackson ruled that affirmatively choosing to click the "like" button on Adams' Facebook page was not a form of expressive speech protected under the First Amendment as writing an actual message on Adams' page would have been.