Speech: Incumbent Sheriff Has Qualified Immunity in Firing of Deputy Sheriff Who Challenged Him in Election

Nord v. Walsh County, No. 12-3249 (8th Cir. June 26, 2014).

Basing its decision significantly on North Dakota law which provides that sheriffs have broad latitude in maintaining order in their departments, the Eight Circuit has reversed a lower court's denial of qualified immunity for an incumbent sheriff who fired his deputy after a contested election. Although the deputy made statements during the campaign that would generally be considered matters of public concern, the statements were challenged as untrue and gave rise to a reasonable assumption by the sheriff that he could fire his subordinate without violating an established constitutional right.

In 2010 Ron Nord, the deputy sheriff of Walsh County, North Dakota, ran for sheriff against the incumbent, Lauren Wild. Wild won the general election and the next day informed Nord he was terminated because of an "unwritten rule" that deputy sheriffs who run against sheriffs will be fired. Sheriff Wild also said he fired Nord for specific statements he made during the campaign.

Nord sued Walsh County and Sheriff Wild, alleging he was fired in retaliation for statements he made during the campaign that were protected First Amendment speech. The District Court denied Wild's qualified immunity claim. Wild appealed.

HELD: The Eighth Circuit reversed, holding Wild was entitled to qualified immunity.

DISCUSSION: Qualified immunity requires a two-step analysis, wherein courts ask "(1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." *Winslow v. Smith*, 696 F.3d 716, 731 (8th Cir. 2012). Nord had stated he was running because Wild's health was "bad," that Wild's wife did not want him to run, and that Wild was going to resign in a couple years to run for a state senate seat. Wild conceded that Nord's First Amendment rights may have been violated, but he was nevertheless entitled to qualified immunity because terminating Nord did not violate a clearly established constitutional right that Wild, as a reasonable person, would have been aware of.

The majority evaluated whether Nord's speech was protected by the First Amendment under the *Pickering/Connick* balancing test. This test required balancing "Nord's First Amendment rights against Wild's state government employer prerogatives" and involved four issues – "(1) the general authority and responsibilities of the employing government entity, (2) the nature and character of the specific employer-employee relationship, (3) the speech involved and (4) evidence tending to establish the speech's impact on the efficient operation of the government entity." The Eighth Circuit noted the North Dakota supreme court had held that a deputy sheriff's official acts are acts of the sheriff, that the deputy is "the deputy of the sheriff, not of the office of sheriff," and that as an official with no original power, the deputy sheriff is the agent of the sheriff, who is the principal.

The Circuit Court also relied on a state attorney general opinion for the principle that absent some type of restraint on an employee, employees in North Dakota are at-will employees, and that in light of the abovementioned state supreme court law, it was reasonable for the sheriff to consider his deputy an at-will employee whom he could fire without cause.

Finally, the Court looked to its own Circuit precedent for the principle that it gives broad latitude to law enforcement officers in executing their duties, especially the management of subordinate officers. As to when the government as employer may act to avoid disruption of the workplace, the Court specifically cited U.S. Supreme Court case law for proposition that there is no need "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."

Although Nord's statements were made during a campaign and were putatively a matter of public concern, the Circuit Court noted that Wild challenged them as untrue. And even if the statements were matters of public concern they were not so weighty as to override the sheriff's substantial interest in maintaining the efficacy and reputation of his workplace. In sum, Wild was granted qualified immunity given that at least some of Nord's speech was not protected by the First Amendment, that it was not valuable enough to outweigh the sheriff's interest in the workplace, and because Wild had a reasonable belief that firing Nord was within his rights as a public official under North Dakota law and federal jurisprudence.

DISSENT: The dissent differed from the majority in its application of *Pickering/Connick.* It Given that Wild had conceded that Nord's speech was protected, the only issue was whether Nord's right to engage in protected speech was clearly established at the time of the firing. The dissent would have found Nord's right was clearly established, given it was political speech made during a campaign, and would have affirmed the lower court.

http://media.ca8.uscourts.gov/opndir/14/06/123249P.pdf (last accessed July 6, 2014).

Speech: Worcester, Massachusetts Panhandling Ordinances Are Content-Neutral and Do Not Violate Due Process or Equal Protection

Thayer v. City of Worcester, No. 13–2355 (1st Cir. June 19, 2014).

The First Circuit has affirmed the lower court's denial of injunctive relief against two panhandling ordinances—including a restriction against coming closer than 20 feet to solicit people in line at bus stops, ATM's and the like-- finding that the laws were content-neutral and survived rational basis scrutiny and that plaintiffs had failed to sustain their burden of demonstrating facial overbreadth and vagueness.

In 2013, the Worcester, Massachusetts City Council passed two ordinances aimed at panhandling. The first was "An Ordinance Prohibiting Aggressive Begging, Soliciting and Panhandling in Public Places" (Aggressive Panhandling Ordinance), which made it "unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner." It would apply to "soliciting" in the form of using any means of communication with the purpose of obtaining an immediate donation and it defined "aggressive" conduct at two levels: obviously threatening behavior, as by soliciting someone "in a manner likely to cause a reasonable person to fear immediate bodily harm," using "violent or threatening language," or blocking a person's right of way. It also covered potentially coercive behaviors, including soliciting from someone waiting in line to buy tickets or enter a building; soliciting after dark, calculated as "the time from one-half hour before sunset to one-half hour after sunrise"; continuing to solicit from a person