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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

MAY JUN 2024 VOL.65 NO.03



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By: Terrill C. Pyburn, City Attorney, Coconut Creek, Florida, and Norman A. Dupont, Partner, Ring Bender LLP, Newport Beach, California

There is general consensus that co-locating those battling substance abuse in residential settings can help rehabilitation. But communities rarely welcome sober homes into their midst. Laws at the federal, state, and local levels protect recovery facilities against measures aimed at excluding them and codify standards of care for the treatment of recovering residents.

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WHAT EVERY MUNICIPAL ATTORNEY SHOULD KNOW ABOUT THE FIRST AMENDMENT

By: Roger Horner and Ian Williams, Senior Specialists and Legal Editors, Thomson Reuters Practical Law Government Practice Service

No prerogatives are more fundamental to American democracy than those guaranteed by the First Amendment. Whether safeguarding speech, press, or religion, the right to assembly and petition, or a corollary right recognized by the Supreme Court—the freedom of association—local government lawyers are responsible for ensuring that each is protected.

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

When Can Public Officials Block Someone on Social Media?

Supreme Court Justice Elana Kagan recently quipped during oral argument: "You know, these are not like the nine greatest experts on the internet" referring to herself and her colleagues on the bench.[1] Despite that confession, the Supreme Court has not shied away from tackling several significant cases involving social media and the internet this Term.[2] But perhaps because of that self-awareness, the Court was fairly temperate in its ruling in *Lindke v. Freed*, which involved the question of when a public official's social media account constitutes "state action" such that it is subject to the First Amendment. The unanimous decision clocked in at only 15 pages and produced no additional writings (either concurrences or dissents), which for such a complicated and important issue, is somewhat surprising.[3]

The Local Government Legal Center filed an amicus brief (joined by IMLA, NACo, and NLC) advocating for a clear and easy to apply state action test focused on authority.[4] The brief also highlighted the unworkable nature of the subjectively-driven "appearance" test advanced in various lower court cases and urged the Court to reject that model. And the brief argued that public officials have their own First Amendment rights, which could be squelched if the Court adopts too broad of a test.

The Court's ruling adopted many of the LGLC's positions and provides some clarity for local governments and their officials, though it also leaves open several unanswered questions. Because local governments can in some circumstances be liable for their employees' or officials' use of social media if a court finds that the use constitutes "state action," it is imperative that local government attorneys familiarize themselves with the decision and train their employees and officials on how to avoid liability. This article will discuss the decision as well as IMLA's 2019 *Model Social Media Policy* and the practice pointers for local government attorneys in this area of the law.

Lindke v. Freed

In this case, Mr. Freed operated a Facebook page, which he started in college in 2008. In 2014, he was appointed the city manager of Port Huron, Michigan and he added that information to his Facebook page. He listed his contact information as Port Huron's, including linking to the city website, city email, and so on.

Mr. Freed posted primarily about personal matters including pictures of his family, his dog, and the food he likes to eat. However, he also posted information about his job, including the City's COVID-19 policies and articles on public-health measures as the pandemic continued. According to Mr. Freed, he would only repost on his social media account things about COVID-19 that had already been posted elsewhere – i.e., none of the information posted was available solely via Mr. Freed's account.

Mr. Lindke was a citizen of Port Huron and unhappy with the City's COVID policies. Mr. Lindke would post negative comments on Mr. Freed's Facebook page and Mr. Freed initially deleted those comments, but then eventually blocked Mr. Lindke from the page.

Mr. Lindke sued, claiming blocking him from the Facebook page was "state action" for the purposes of a Section 1983 claim and that Mr. Freed had violated his First Amendment rights in doing so. Mr. Freed argued his account was strictly personal and not subject to the constraints of the First Amendment. The Sixth Circuit found in favor of Mr. Freed, concluding the proper test to determine if the government official is engaging in state action is to ask whether he was "performing an actual or apparent duty of his office or if he could not have behaved as he did without the authority of his office."[5] The lower courts were split on the proper test and the Ninth Circuit in a separate case involving the same question held that state action applies to public officials' social media accounts based on the "appearance and content" of the pages.[6]

The Supreme Court took the case to resolve the split and provide the test to determine when the First Amendment applies to a government official's social media account. In a unanimous decision authored by Justice Barrett, the Court rejected the Ninth Circuit's subjective "appearance and content" test and concluded that a government official's social media posts are "attrib-

utable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when he spoke on social media."[7] The Court noted that the "appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first."[8] The authority must be "real, not a mirage" because "to misuse power… one must possess it in the first place."[9] The analysis will hinge on substance and not the mere label of public official and the Court explained, it will require a fact-intensive inquiry.[10]

The test is derived from the text of Section 1983, which provides a cause of action where "[e]very person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State* deprives someone of a federal constitutional or statutory right."[11] Thus, a public official has the authority to speak on behalf of the government if based on a written law, regulation, or ordinance which authorizes that person to make official announcements or if there is a well-established custom such that the "power to do so has become permanent and well settled."[12] (internal quotations omitted).

The Court noted that in situations where an account belongs to the government or is passed down to the occupier of the particular office, those would be government accounts subject to the First Amendment.[13] But in many circumstances, the Court acknowledged that the line can be "difficult to draw."[14] The difficulty is magnified because the nature of some public officials' work can make it seem like "they are always on the clock."[15] But the Court emphasized that public officials have their own First Amendment rights, including rights to speak about their employment, that they do not relinquish simply by becoming public officials.[16]

The burden is on the plaintiff to show the official is "purporting to exercise state authority in specific posts."[17] Additional factors, such as the use of governmental staff and resources may help demonstrate the use of that authority.[18] The Court admonished lower courts not to rely on "excessively broad job descriptions" to conclude that authority to speak on behalf of the government exists.[19] Instead, the question should be "whether making official announcements is actually part of the job that the State entrusted the official to do."[20]

The Court provided hypotheticals to help illuminate its test. It explained that in cases where someone has the authority to communicate with their residents, for state action to exist and First Amendment liability to attach, "there must be a tie between the official's authority and the gravamen of the plaintiff's complaint." For example, if Mr. Freed had no authority over public health and he was posting about local restaurants with health-code violations and deleted unwanted comments on those posts, he would not be acting with any state authority and would not violate the First Amendment. The Court offered another example and additional guidance:

> Take a mayor who makes the following announcement exclusively on his Facebook page: "Pursuant to Municipal Ordinance 22.1, I am temporarily suspending enforcement of alternate-side parking rules." The post's express invocation of state authority, its immediate legal effect, and the fact that the order is not available elsewhere make clear that the mayor is purporting to discharge an official duty.[21]

On the other hand, the Court explained that if the mayor in the hypothetical is merely sharing information that is otherwise publicly available, it is far less likely to be state action.[22]

Finally, the Court also offered that public officials may use labels and disclaimers on their social media pages such as "this is the personal page" of the individual or "the views expressed are strictly my own" which, would entitle the official to "a heavy (though not irrebuttable) presumption that all of the posts on his page were personal."[23] However, the Court noted such a disclaimer cannot provide cover to conduct government business on a so-called personal page such as by making the only avenue to view a live stream a council meeting on a so-called "personal" page.[24]

Because Mr. Freed's page did not have a disclaimer and he posted about both private matters and those related to his job, the Court remanded to the Sixth Circuit to re-examine the case. The Court also noted that lower courts will need to examine both activities that he engaged in on the social media account: deleting and blocking.[25] The Court cautioned that because blocking is a blunt instrument, when an official is using social media in a mixed way, as Mr. Freed did, there is a greater potential to expose themselves to liability as the court must analyze the entire social media page.[26] Deleting on the other hand, is more precise and the only relevant inquiry for First Amendment purposes pertains to those posts for which the comments were deleted.[27]

While the decision offers some guidance, there are also unanswered questions. First, since the test is based on authority, can a member of an elected body ever be liable under the test if acting alone on a social media account since technically that elected official would have no sole authority over government matters. (While we do not want to train these elected officials to think they may never be liable, certainly advocates will want to make this argument if a case ever arises). Second, how specifically must authority be defined to create potential liability? Third, how will mayors and other executives limit liability and not be seen as "always on the clock" given their significant unilateral authority (which may vary by charter and state law). Fourth, under what circumstances will courts find that

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there is a "well-established custom" of government authority? These cases will require intensive factual development around the government employee's authority, and we will learn more as lower courts issue decisions in this area.

Local government attorneys should review the decision and their social media policies to ensure compliance with the decision. Just as importantly, training for local government officials and employees will be imperative to avoid liability in this area. IMLA developed a model social media policy in 2019 that primarily focuses on a local government's own use of social media, but also contains guidance regarding use of social media by employees and elected officials.. Much of that guidance in the policy is consistent with the Court's decision and the policy can be obtained from IMLA's resource library. While the law will continue to evolve in this area and attorneys would be wise to follow developments in their jurisdiction, the below practice pointers can be discerned from the Court's decision.

Practice Pointer #1:
The easiest and safest way to avoid liability is for employees and officials to have separate accounts for their private matters from any account related to their work at the City/County. However, as the Court explained, the First Amendment does not require that result. Moreover, because many aspects of a local government employee's job may be of general interest to that person and the community in general, it may be difficult or unrealistic for them to refrain from posting about their job.

Take Mr. Freed and COVID-19 as an example. At the time he was posting about the City's COVID-19 policies and other matters related to public health, the entire world was focused on those matters. To say that Mr. Freed could not post about COVID-19 on (what he considered) his private social media account or post about the City's policies would treat public employees as second-class citizens when it comes to the First Amendment, something the Constitution does not require.

Thus, it may be easier for some employees to maintain this wall of separation than for others. But the Constitution does not require the separation, nor can we, as local governments, dictate to employees that they are prohibited from posting about publicly available matters pertaining to work as such a directive from the local government could in and of itself run afoul of the First Amendment. Thus, while maintaining separate accounts is the gold standard, local governments should not mandate separate accounts. But they should certainly try to steer their employees and officials in this direction.

Practice Pointer #2:
Employer policies should prohibit employees from including the City/County's logo, email, and websites on their personal social media accounts. Policies should also clearly prohibit the use of City/County staff and resources to run the social media account. And employer policies should discourage

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employees from identifying themselves as City/County employees when engaging in social media within their private capacity. However, as noted above, employers may not be in a position under the First Amendment to prohibit their employees from identifying themselves as a City/County employee. In that case, we move to Practice Pointer #3.

Practice Pointer #3:
If an employee chooses to identify themself as an employee of the City/County in a private social media account (after being discouraged from doing so), employer policy should require the use of disclaimers by the employee. As Justice Barrett notes in the decision, a disclaimer may provide a "heavy (though not irrebuttable) presumption" that the post made by the employee is personal. Something as simple as "These are my own opinions and do not necessarily represent those of the City/County." Employers should ensure their policies require these disclaimers.

Practice Pointer #4:
Employees should never post something to a personal social media account related to City/County business if the "personal" account is the only place that information is available. Justice Barrett made this point in the decision and employers should ensure their policies reflect this requirement.

Practice Pointer #5:
After employees have implemented the above on their social media accounts and policies have been updated, in conducting training, remind employees to be extremely careful about blocking an individual versus deleting their comments on any personal pages. If an official blocks someone from their so-called personal account, then their entire page will be under judicial scrutiny. If by contrast, the employee deletes a comment on a post about their dog, the review will be limited to the particular posts where the comments were deleted, not the whole page. The likelihood of liability greatly increases with blocking versus deleting.

Practice Pointer #6
As alluded to in some of the above practice pointers, in crafting your social media policy do not forget about your employees' First Amendment rights. That said, those rights are not unlimited in the public employment context. Employees must protect confidential information, adhere to the rules of ethics, public records laws, open meeting law requirements, and may be admonished not to attribute personal statements or opinions to that of the City/County. Further, their off duty conduct on social media can adversely affect the workplace and they should be reminded in employer social media policies not to create hostile work environments or violate other federal, state, or local laws.

Practice Pointer #7
IMLA's social media policy notes that localities should consider whether they should allow indemnification for employees and officials who violate

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