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SECOND CIRCUIT REVIEW

BY MARTIN FLUMENBAUM AND BRAD S. KARP

First Amendment: Limited Protection for Anonymous Speech

IN THIS, OUR 200th column, we report on a recent decision by the United States Court of Appeals for the Second Circuit in which the court upheld the firing of an administrative police officer based on his anonymous mailing of racist and anti-Semitic materials to charitable organizations that solicited donations from him.

In *Pappas v. Giuliani*,[1] a sharply divided Second Circuit, in an opinion written by Judge Pierre N. Leval, upheld the district court's grant of summary judgment dismissing the officer's claim that his termination from the New York City Police Department infringed his rights under the First Amendment. The court reasoned that because a police department cannot function effectively without public perception that it enforces the law in an unbiased manner, the state's interest in promoting the efficiency of its services outweighs the officer's interest as a citizen in commenting on matters of public concern. Judge Colleen McMahon (United States District Court for the Southern District of New York, sitting by designation) filed a separate concurring opinion reasoning that the court need not reach this balancing analysis because the officer's mailings did not constitute speech on a matter of public concern. Judge Sonia Sotomayor filed a strong dissent.

Background and Proceedings

Officer Thomas Pappas was terminated from the New York City Police Department (NYPD) on Aug. 18, 1999. At the time of his termination, Mr. Pappas worked as a computer operator in the NYPD information systems division.[2] Before his transfer to information services, Mr. Pappas spent five years as a patrol officer, and he testified that he could have been reassigned to patrol duty at any time.[3]

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On at least two occasions, Mr. Pappas received letters from the Mineola Auxiliary Police Department soliciting charitable contributions. He responded by filling the enclosed return envelopes with racist and anti-Semitic materials and returning them anonymously. The materials included printed fliers promoting white supremacy and warning against the "Negro wolf … destroying American civilization with rape, robbery and murder" and commenting "how the Jews control the TV networks and why they should be in the hands of the American public and not the Jews."[4] Nowhere in the mailings did Mr. Pappas identify himself or his affiliation with the NYPD. Mr. Pappas apparently also responded to charitable solicitations from other, non-police-related organizations in a similar manner. In total, he sent several hundred such mailings.[5]

The Nassau County Police Department responded to receipt of these offensive materials by initiating an investigation to identify the sender. The department did this by sending out a similar charitable solicitation enclosing coded return envelopes. Mr. Pappas took the bait and used the coded envelope to send another batch of racist and anti-Semitic literature. The Nassau County Police Department was thus able to trace the literature's source to a post-office box registered under the name "Thomas Pappas/The Populist Party for the Town of North Hempstead," and the name "Thomas Pappas" was then identified as belonging to an officer in the NYPD. This investigative technique was repeated several more times with similar results, first by the Nassau County Police Department and later by the NYPD Internal Affairs Bureau.[6]

The NYPD charged Mr. Pappas with violation of a departmental regulation forbidding dissemination of defamatory materials through the mails. After a disciplinary trial, Mr. Pappas was found guilty of violating this regulation and was dismissed from the NYPD.[7] He brought a §1983 claim in the Southern District of New York contending that his dismissal violated his First Amended rights.

The district court (Buchwald, D.J.) granted summary judgment dismissing Mr. Pappas' claim, finding that the speech at issue did not constitute speech on a matter of public concern as required by the Supreme Court in *Connick v. Myers*.[8] Rather, the district court concluded that Mr. Pappas' own testimony at his disciplinary hearing indicated that he "intended to convey no message of 'public concern' in his mailings to solicitors; he simply wanted to dissuade charities from soliciting money from him by offending them with racist mailings" as a form of "protest" against "being shaken down for money by the so-called charitable organizations."[9]

The district court also noted that the fact that Mr. Pappas sent his anonymous mailings solely to whatever "random" charities had "the misfortune of soliciting a donation from him" undercut the argument that the mailings were part of the "uninhibited, robust, and wide-open debate on public issues that the First Amendment affords its highest protection."[10] Finally, the district court concluded that even if the mailings constituted speech on a matter of public concern, the police department's interest in maintaining public respect and collegiality outweighed any First Amendment protection to which the speech otherwise was entitled.[11]

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'Pickering' Balancing Analysis

The Second Circuit assumed, arguendo, that Mr. Pappas' mailings constituted speech on a matter of public concern and focused its analysis on the balancing test established by the Supreme Court in *Pickering v. Board of Education* for evaluating the constitutionality of termination of a government employee for such speech.[12] Under *Pickering*, the Court noted that its task is to "arrive at a balance between the interests of the … citizen in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[13] Applying this test, the court explained that a police department's efficiency depends on community perception that the police enforce the law in an unbiased manner, as any perception to the contrary drastically reduces community cooperation with the police. Mr. Pappas' mailing risked creating a perception of police bias, because "[f]or a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery and murder, tends to promote the view among New York's citizenry that those are the opinions of New York's police officers."[14] The court also noted that the type of bigoted mailings Mr. Pappas disseminated also tended to cause friction and distrust within the NYPD, further impairing that department's ability efficiently to perform its role, and concluded that "[i]n these circumstances, an individual police officer's right to express his personal opinions must yield to the public good."[15]

'Pappas … Took the Risk'

The court rejected Mr. Pappas' argument that his mailings did not implicate the harms outlined above because they did not identify him or his affiliation with the NYPD. The court reasoned that Mr. Pappas affirmatively publicized his views by sending out provocative leaflets with the intention of influencing public opinion and did so in violation of a police regulation forbidding dissemination of defamatory materials. Accordingly, "[a]lthough Pappas tried to conceal his identity as a speaker, he took the risk that the effort would fail" and that his speech would therefore impair the department's performance of its duties.[16] The fact that it was ultimately a police department investigation of the source of the offensive materials that caused Mr. Pappas' affiliation with the NYPD to come to light was not relevant, the court reasoned, because "[a] governmental employer's right to discharge an employee by reason of his speech in matters of public importance does not depend on the employer's having suffered actual harm resulting from the speech."[17] Rather, *Pickering* requires only that "[t]he employee's speech … be of such nature that the government employer reasonably believes that it is likely to interfere with the performance of the employer's mission."[18]

Concurrence: Private Speech

Judge McMahon's concurrence concluded, like the district court, that the *Pickering* balancing analysis was inapplicable because Mr. Pappas' mailings constituted purely private speech. While the speech at issue concerned race relations and other matters of political significance, Judge McMahon reasoned that not all speech relating to such matters is speech on a matter of public concern within the meaning of *Connick* and *Pickering*. Rather, such speech is not protected if it is "simply a vehicle for furthering [the employee's] private interests" — here, Mr. Pappas' interest in avoiding (as he put it) "[being] shaken down for money by the so-called charitable organizations."[19]

Dissent: Uncharted Territory

In a strongly worded dissent, Judge Sotomayor noted that the court "enters uncharted territory in our First Amendment jurisprudence" by holding that the government does not violate the First Amendment when it fires a police department employee for racially inflammatory speech that (a) consisted of mailings in which the employee did not identify himself or connect himself to the police department; (b) occurred away from the office and on the employee's own time; (c) was made by an employee without policy-making authority or public contact; (d) was not shown to have been the direct cause of workplace disruption; and (e) was brought to the community's attention only through the investigative efforts of two police departments.[20]

Judge Sotomayor began her analysis by concluding that Mr. Pappas' mailings constituted speech on a matter of public concern, because "issues of race relations are inherently of public concern."[21] She distinguished the line of cases that stand for the proposition that speech is not on a matter of public concern if it is motivated by private interest, on the ground that each of these cases concerned an employee speaking about issues relating to his or her own employment.[22]

Turning to the *Pickering* balancing analysis, Judge Sotomayor criticized the majority for failing adequately to consider the five factors identified above, each of which goes to the likelihood of Mr. Pappas' speech disrupting the NYPD's performance of its duties. She concluded that "[t]he majority's decision allows a government employer to launch an investigation, ferret out an employee's views anonymously expressed away from the workplace and unrelated to the employee's job, bring the speech to the attention of the media and the community, hold a public hearing, and then terminate the employee because, at that point, the government reasonably believes that the speech would potentially … disrupt the government's activities."[23]

Conclusion

As Judge Sotomayor's dissent notes, this case may ultimately be read to diminish substantially the First Amendment protection attached to anonymous political speech, based on public policy grounds. Whether district courts extend the majority ruling to dampen First Amendment protections in other capacities remains to be seen.

(1) 290 F3d 143 (2d Cir. 2002).
(2) Id. at 144.
(3) 118 FSupp2d 433, 435.
(4) 290 F3d at 145.
(5) Id. at 153 (McMahon, J., concurring).
(6) Id.
(7) Id.
(8) 461 US 138, 146 (1983).
(9) 118 FSupp2d at 445 (quoting testimony from disciplinary hearing).
(10) Id.
(11) Id. at 446.
(12) 391 US 563 (1968).
(13) 290 F3d at 145 (quoting *Pickering*, 391 US at 568).
(14) Id. at 147.
(15) Id.
(16) 290 F.3d 147-48.
(17) Id. at 151 (emphasis in the original).
(18) Id.
(19) Id. at 153.
(20) Id. at 154.
(21) Id..
(22) Id. at 156.
(23) Id. at 159.