BLOCKING OR DELETING SOCIAL MEDIA SPEECH: THE U.S. SUPREME COURT'S *LINDKE* DECISION

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In a recent case of first impression, a unanimous Supreme Court outlined when a public official may be liable for a civil rights violation if the official blocks or deletes comments from their posts on social media, such as Facebook. Writing for the Court, Justice Barrett held that if the social media post is within the scope of the public official's duties and the official purported to exercise that authority in a specific post, then a citizen whose comment is deleted or blocked may have a claim for viewpoint discrimination, in violation of the First Amendment. This can be particularly true if the public official maintains a public Facebook page, does not clearly state that the page is personal, or that the views expressed are strictly their own.

What Happened in *Lindke*?

Freed was a city manager of a Michigan municipality who converted his personal Facebook account to a public page when he began nearing the platform's 5,000 friend limit. This meant that any Facebook user could see and comment on his posts. Freed chose "public figure" for his page's category.

After Freed was hired as a City Manager of Port Huron, Michigan in 2014, Freed updated his Facebook page to reflect his new job. In the "About" section, Freed added his title, a link to the City's website and the city's general email address.

He described himself as "Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI."

Both before and during his employment as a city manager, Freed posted on a wide variety of matters, ranging from his family to his job. According to the Court, some of his family posts included: photos of his daughter, dinner with his wife, Bible verses, home-improvement projects and pictures of his dog, Winston. Freed also posted various items relating to his job, including city construction projects, local leaf pickup, annual financial reports, and public press releases. At times, Freed also occasionally solicited feedback from the general public.

During the COVID-19 pandemic, Lindke (the plaintiff) visited Freed's Facebook page. Unhappy with the city's COVID policy, Lindke responded to one of Freed's posts by commenting that the city's COVID response was "abysmal" and that the "city deserves better." Initially, Freed deleted Lindke's comments. Later, Freed entirely blocked Lindke from commenting on Freed's posts.

Lindke responded with a lawsuit, claiming that Freed was a government actor and his Facebook page was a public forum. As such, Lindke argued that it was unconstitutional under the First Amendment for the "government" (in this case, Freed) to limit Lindke's ability to speak on matters of public concern simply because Freed did not like the content of Lindke's posts.

What did the U.S. Supreme Court Say?

Lindke lost at the district and appellate court levels, because (according to those courts) Freed was not the "government" and his Facebook page was not a public forum. In other words, Freed's Facebook page was not state action that could create constitutional liability under 42 U.S.C. § 1983. As a result, Freed was free (like any citizen) to delete posts with which he did not agree.

The U.S. Supreme Court granted Lindke's appeal but did not expressly say whether Lindke should win or lose his lawsuit. Instead, the Court in a 9-0 opinion authored by Justice Barrett, announced a new test for determining when individual social-media activity can be viewed as state action for Section 1983 purposes. Specifically, the Court held that social media activity will be considered state action when 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. The Court then remanded the case back to the appellate court so that it could apply this newly announced test to Freed's fact-pattern.

With this new test, the Court conceded that it is not always easy to decide when a government employee is operating a Facebook page as a private citizen or a government official:

> There are approximately 20 million state and local government employees across the Nation, with an extraordinarily wide range of job descriptions—from Governors, mayors, and police chiefs to teachers, healthcare professionals, and transportation workers. Many use social

> media for personal communication, official communication, or both—and the line between the two is often blurred. Moreover, social media involves a variety of different and rapidly changing platforms, each with distinct features for speaking, viewing, and removing speech. The Court has frequently emphasized that the state-action doctrine demands a fact-intensive inquiry.

With this reality in mind, the Court cautioned that not all social media platforms operated by government officials are actually attributable to the "state." In that respect, a plaintiff must show that an individual has "actual authority rooted in written law or longstanding custom to speak for the State. That authority must extend to speech of the sort that caused the alleged rights violation." In other words, the "alleged censorship must be connected to speech on a matter within [the official's] bailiwick." Simply having some generalized authority to communicate with residents is not enough.

A plaintiff must also show that the official who denied the plaintiff's right to speak did so in his capacity as a government official. In that respect, the Court noted that labels on a Facebook page stating "this is my personal page" or "the views expressed here are strictly my own" will go a long way to disproving that the site's owner purported to act on behalf of the government entity. By contrast, if a social media post by a mayor says something like "Pursuant to Ordinance 22.1, I am temporarily suspending enforcement of alternate side parking rules" it would be very clear that the mayor is purporting to act on behalf of the government entity (even if the social media site is marked as "personal").

How Significant is this New Test?

High-level public officials (*e.g.*, city managers, CEOs, school superintendents, chiefs, department heads, *etc*.) and elected officials (*e.g.*, mayors, trustees, commissioners, and council members) who maintain their own public social media platforms should take careful note of the *Lindke* test. Those are the types of individuals who are most likely to (a) have the actual authority to speak on behalf of the government entity about a wide-range of topics; and (b) purport to speak on behalf of the government entity when posting items about how their government entity is being run. In turn, those individuals are the ones who should carefully scrutinize their social media sites in order to ensure that they cannot be characterized as "state action" for First Amendment purposes.

Even when certain supervisors or department heads (e.g., Police Chiefs, Fire Chiefs, Public Works Directors, *etc*.), have the actual authority to speak on behalf of the government entity, they likely will not "purport" to do so on their personal social media sites, particularly if the site clearly indicates that the comments are purely personal in nature, and do not reflect any official view. For example, a plaintiff would be hard pressed to argue that a Police Chief who posts a political comment on his private Facebook page (whose settings are set to "private"), is purporting to speak on behalf of his government entity when the vast majority of his private posts are generally unrelated to his government job. By extension, such a scenario likely

would not satisfy the second prong of the newly announced *Lindke* test, which means the Police Chief would be free to delete posts or ban posters that he does not like.

Posts on government-run social media sites (*e.g.*, a Facebook or Twitter account owned by a municipality) will almost always be considered state action under the *Lindke* test. In other words, a governmental unit cannot delete posts or ban citizens from posting undesirable comments on a publicly-run forum simply because the government does not like the message's content.

Finally, the Court noted the nature of technology matters to the state-action analysis. Freed performed two actions in the instant case, he deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the Court said the only relevant posts are those from which Lindke's comments were removed. Because blocking operates on a page-wide basis, a court would have to consider whether Freed engaged in state action with respect to any post on which Lindke wished to comment. The Court added:

> The bluntness of Facebook's blocking tool highlights the cost of a 'mixed use' social media account: If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.

The Court concluded that a public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability.

Action Items

Public employers who wish to avoid being implicated when their employees censor unwanted messages on their personal social media sites should consult with legal counsel regarding possible amendments to ordinances, regulations and/or handbooks in order to preclude or limit the authority of lower-level public employees to speak on behalf of the public employer. That way, the first prong of the *Lindke* test cannot be satisfied, which in turn means censored citizens should have no cause of action against either the government employee or employer.

As for high-ranking public officials and elected officials, they presumably will want to consult with their own legal counsel to determine the best way to insulate their social media sites so they are not misconstrued as reflecting "state action" particularly before comments are deleted or users are blocked from their site. As the Court noted, a public official who fails to keep posts in a clearly designated personal account exposes himself to greater potential liability.

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