Boston University
Journal of Science & Technology Law

Legal Update

Internet Access: Constitutional Rights of State Employees*

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1. In a recent First Amendment case, a Panel of the U.S. Court of Appeals for the Fourth Circuit rejected a challenge to a Virginia law ("Act") prohibiting state employees from viewing sexually explicit content on state-owned computers.[1] The central part of the Act provides:

> Except to the extent required in conjunction with a bona fide, agency-approved research project or other agency-approved undertaking, no agency employee shall utilize agency-owned or agency-leased computer equipment to access, download, print or store any information infrastructure files or services having sexually explicit content.[2]

2. Several professors at public colleges and universities sued the Governor of the Commonwealth of Virginia, alleging that the statute infringed their First Amendment guarantees.[3] The plaintiffs argued that the Act violated their free speech rights by interfering with their employment duties in varying degrees.[4] For example, the lead plaintiff, Melvin I. Urofsky, stated that he did not assign an on-line research project on decency laws because he thought that he would not be able

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 Cite to this Legal Update as 5 B.U. J. SCI. & TECH. L. 14 (1999). Pin cite using the appropriate paragraph number. For example, cite to the first paragraph of this Legal Update as 5 B.U. J. SCI. & TECH. L. 14 para. 1 (1999).

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[1] *See* Urofsky v. Gilmore, 167 F.3d 191 (4th Cir. 1999).

[2] VA. CODE ANN. § 2.1-805 (Michie 1996).

[3] *See Urofsky*, 167 F.3d at 193.

[4] *See id.* at 194.

to check his students' work without violating the Act.[5] Another plaintiff, Terry L. Meyers, thought that the Act prohibited him from researching some types of Victorian poetry on-line.[6] Similarly, others said that researching aspects of human sexuality on-line would subject them to legal action.[7]

3. The District Court granted the plaintiffs' summary judgement motion and held that the Act was unconstitutional.[8] The judge, Judge Brinkema, held that the Act was both underinclusive and overinclusive.[9] The Act only prohibited access to sexually explicit content[10] and was underinclusive because it was designed to prevent disruptions and inefficiencies in the workplace while many other computer resources, such as video games and chat rooms, were not restricted.[11] The Act was also designed to prevent a hostile work environment, but it did not prohibit potential non-computer sources of hostility, such as traditional photography.[12]

4. The District Court also found the Act to be overinclusive because of its intention to prevent a "sexually hostile work environment."[13] The Act restricted legitimate research on sexuality and the human body, which would not affect the quality of a work environment, making the Act unconstitutional in Judge Brinkema's view.[14]

5. The court also held that the Act was invalid in spite of an enforcement mechanism that allowed for agency approval of projects involving sexually explicit material.[15] The Act gave an agency head unchecked discretion to allow access to on-line information, but because the mechanism did not proivde state employees with a process to appeal the agency head's decision, the mechanism was insufficient.[16]

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[5] *See id.* at n.4.

[6] *See id.*

[7] *See id.*

[8] *See* Urofsky v. Allen, 995 F. Supp. 634 (E.D. Va. 1998).

[9] *See id.* at 640-41.

[10] *See* VA. CODE ANN. § 2.1-805 (Michie 1996).

[11] *See Urofsky*, 995 F. Supp. at 640.

[12] *See id.*

[13] *See id.*

[14] *See id.*

[15] *See id.* at 641.

[16] *See id.* at 641

Further, the existence of equally effective neutral policies weakened the state's interests in passing the law, compared to the rights of its employees.[17]

6. The Fourth Circuit's decision hinged on the fact that the state as an employer has broader discretion to restrict its employees' speech than it does to restrict the speech of ordinary citizens.[18] The plaintiffs challenged the Act for infringing their rights as public employees, not as private citizens.[19] Typically, the First Amendment requires a balancing of state employees' interests, as citizens, in making statements on matters of public concern with the state's interest, as an employer, in maintaining an efficient administration of its employees.[20] In doing that balancing, a court looks at whether the employees' speech involves "a matter of public concern."[21] In this case, if the Virginia employees' speech does "not touch upon a matter of public concern," the state may regulate the speech as an employer without violating the Constitution.[22]

7. The court discussed several factors in deciding whether the state employees' right to access sexually explicit content on state-owned computers was speech involving a matter of public concern.[23] For example, the court examined whether the speech "affects a social, political, or other interest of a community."[24] Also, the court "examine[d] the context, content, and form of the speech at issue in light of" the facts.[25] The court did not consider, however, how "interesting or important" the speech was,[26] or where the speech occurred.[27] Rather, the most important part of the court's analysis was whether the speech at issue was made in the state employees' roles as citizens or in their professional capacities.[28]

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[17] *See id.* at 643.

[18] *See* Urofsky v. Gilmore, 167 F.3d 191, 194 (4th Cir. 1999) (citing Waters v. Churchill, 511 U.S. 661 (1994) (plurality)).

[19] *See id.* at 194.

[20] *See* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

[21] *See id.*

[22] *See* Holland v. Rimmer, 25 F.3d 1251, 1255 n.11 (4th Cir. 1994).

[23] *See* Urofsky, 167 F.3d. at 195.

[24] *See id.* (citing Connick v. Meyers, 461 U.S. 138, 146 (1983)).

[25] *See id.* (citing *Connick*, 461 U.S. at 147-48).

[26] *See* Terrell v. University of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986).

[27] *See* DiMeglio v. Haines, 45 F.3d 790, 805 (4th Cir. 1995) (finding that speech "outside the workplace" was made by employee in his "official capacity").

[28] *See Terrell*, 792 F.2d at 1362.

8. The court determined that the Virginia statute did not infringe upon protected speech because the plaintiffs sued based on speech that they made in their roles as public employees.[29] Because the employees did not make the speech in as citizens, it was not protected.[30] Therefore, the plaintiffs could not challenge the Act as being too broad or narrow.[31] Further, the Act was not too vague because it gave "people of ordinary intelligence a reasonable opportunity to know what is prohibited."[32] The Court of Appeals reversed the District Court, and the Act became valid law in Virginia once again.[33]

[29] *See Urofsky*, 167 F.3d at 196.

[30] *See id.*

[31] *See id.* (upholding the Act and stating that "the speech may be restricted consistent with the First Amendment").

[32] *See id.* at n.8 (citing Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)).

[33] *See id.* at 196.