Client Alert



Intellectual Property

Social Media & Games

September 25, 2013

Free Speech Protection for Facebook "Likes" by Public Employees

By Kelly W. Craven

Last week, in <u>Bland v. Roberts</u>, the U.S. Court of Appeals for the Fourth Circuit handed a constitutional victory to Facebook and two plaintiffs who lost their jobs after displaying online support for the incumbent's opponent in a sheriff's election. Reversing the district court decision, which said that "liking" a Facebook page was not sufficient "expressive speech" to warrant First Amendment protection, the appellate court ruled that the act was "pure speech," as well as symbolic expression.

In 2009, Sheriff B.J. Roberts of the Hampton Sheriff's Office in Virginia ran for re-election after having served for 17 years. He was opposed by Jim Adams, who retired from the Sheriff's office as a lieutenant colonel to run for election. Upon his re-election, Roberts reappointed all but twelve employees. Six of those subsequently sued for retaliation and violation of their First Amendment rights to support his political opponent. Two of those fired employees, deputies Daniel Carter and Robert McCoy, claimed they were punished for "liking" Adams' Facebook campaign page.

The evidence of Roberts's animus was strong. During a shift change speech, Roberts expressed his disapproval of employee support for Adams on Facebook, claiming that he would be sheriff for as long as he wanted, indicating that Adams's train was the "short train," and implying that open allegiance with his opponent would cost people their jobs. Roberts specifically told Carter, "You made your bed, and now you're going to lie in it – after the election, you're gone."

Nevertheless, all plaintiffs lost on summary judgment at the district court. However, the Court of Appeals remanded the case for trial to determine whether political disloyalty to Roberts was a substantial basis for his non-reappointment of Carter, McCoy, and one other plaintiff.

What makes this retaliation case distinctive is the role Facebook played in the decision. The district court found that "liking" a Facebook page was not speech, rather it was "one click of a button." The judge drew a distinction between this "click" and cases where courts had extended constitutional protections to Facebook posts in which actual statements had been made.

On appeal, the circuit court flatly disagreed. Citing several Facebook company postings, including *"What is a Facebook Page?," "What is News Feed?,*" and *"What's the difference between liking an item a friend posts and liking a Page?*", the court declared it apparent that the conduct of "liking" Adams's campaign page unmistakably qualifies as speech: "That a user may use a single mouse click to produce [the] message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance."

Thus, the "like" itself, is a substantive statement. Further, the display of the "thumbs up" symbol is a symbolic expression of support for the campaign and approval of the candidate. The appellate decision borrowed the analogy from Facebook's amicus brief that Carter and McCoy's "likes" were "the Internet equivalent of displaying a political sign in one's front yard" – political speech which is afforded the highest level of protection. While private employees are not provided the same First Amendment protections, private employers should be cautious about disciplining employees for their speech in social media mediums.

In this case, a Facebook picture

Like

was worth a thousand words.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author.

Kelly W. Craven ^(bio) Los Angeles +1.213.488.7585 kelly.craven@pillsburylaw.com

Bobby Ghajar ^(bio) Los Angeles +1.213.488.7551 bobby.ghajar@pillsburylaw.com James G. Gatto (bio) Northern Virginia +1.703.770.7754 james.gatto@pillsburylaw.com

Christine N. Kearns ^(bio) Washington, DC +1.202.663.8488 christine.kearns@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice. © 2013 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.