



SUMMIT
LAW GROUP

JESSICA L. GOLDMAN

April 26, 2024

FIRST AMENDMENT ISSUES FOR PUBLIC OFFICIALS



We will consider 4 questions:



1. What is defamatory when directed at a public official or spoken by a public official?
2. May a public official or public agency limit the public's engagement on social media?
3. When does a public official post in her "public official capacity" and when does she post in her "personal capacity"?
4. What limits may a governing body place on a public official's speech?



- The 1st ? considers what speech by or about a public official may create liability
- The 2nd ? considers the power of a public official to restrict speech by others
- The 3rd ? considers the right of a public official to speak in her private capacity
- The 4th ? considers what kinds of limits government can place on speech by a public official



What is required to prove defamation?



1. A false statement of fact
2. An unprivileged communication
3. The speaker's fault
4. The subject's damages



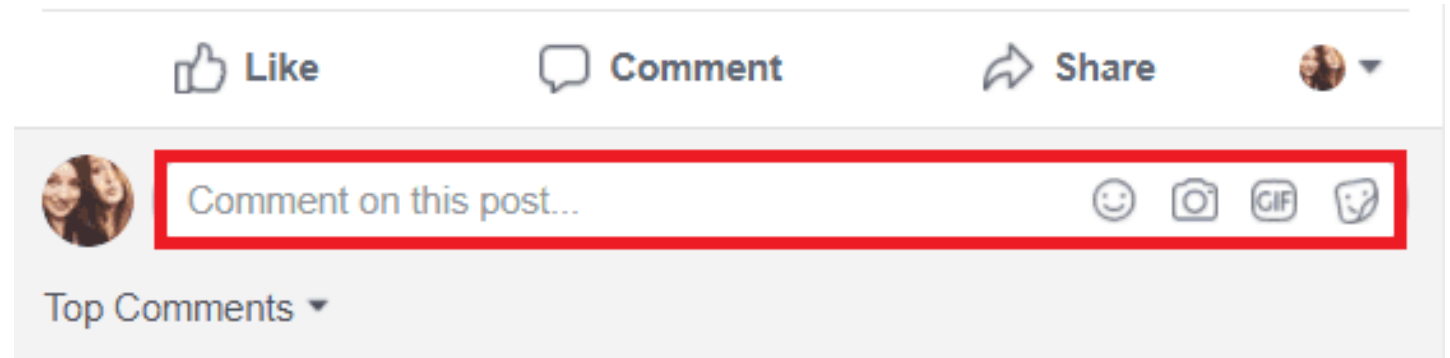
What is a false statement of fact?

- **A statement that can be proven true or false**
 - The Mayor committed fraud
- **A statement that left a false impression that would be contradicted by omitted facts**
 - The Mayor was alone in the apartment with a man at midnight (the man was her husband, the apartment her home)
- **Not a statement of opinion**
 - The Mayor speaks too aggressively or in my opinion the Mayor killed her husband



Context matters ...

Are
exaggeration,
rhetoric, or
hyperbole
expected?



This Photo by Unknown Author is licensed under CC BY-NC



“In the context of ongoing public debates, the audience is prepared for mischaracterizations and exaggerations, and is likely to view such representations with an awareness of the subjective biases of the speaker.”

Dunlap v. Wayne (WA 1986)



A substantially true statement isn't false



Statement: Council Member Jones was convicted of \$5M in bank fraud

Literal truth: Council Member Jones was convicted of \$100,000 in bank fraud



What is a privileged communication?

Some or complete protection no matter whether the statement is true or false

- **Absolute:** Fair report privilege (official proceedings/records)
- **Absolute:** Litigation privilege (pertinent statement made in a lawsuit)
- **Qualified:** Common interest privilege (made among those sharing a common interest)
- **Qualified:** Report by police to the public

What happens with a qualified privilege?



It can be lost if
the plaintiff
proves ...

... actual
malice



What does fault mean?

Fault
considers
who the
plaintiff is

Public Official plaintiff →
actual malice

Private plaintiff →
negligence



“The First Amendment to the United States Constitution is more protective of speech criticizing public officials because such speech is essential to citizens’ ability to thoughtfully engage in public debate and the democratic process. The public good that arises from sharp criticism and examination of public officials’ records requires laws and policies that will not chill such speech. Accordingly, to succeed in any defamation action, a public official must establish something the average defamation plaintiff need not establish: ‘actual malice.’”

Reykdal v. Ezpinoza (WA 2020)



Actual malice?!

knowledge of falsity
or reckless disregard
of the truth or falsity

by clear and
convincing evidence





Negligence??



the defendant knew or, in the exercise of reasonable care, should have known that the statement was false or would create a false impression

by a preponderance of the evidence



When is a plaintiff damaged?

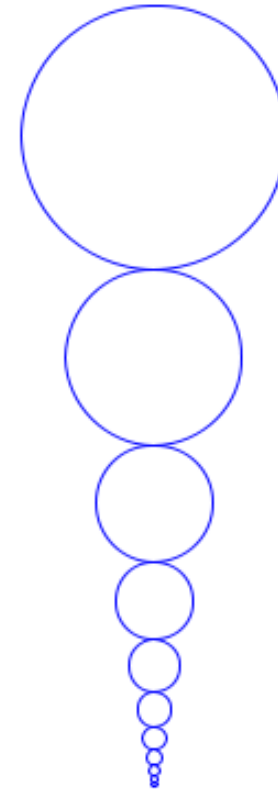
- What was the plaintiff's reputation ... before?
- Did the statement cause damage to the existing reputation?





Different First Amendment Forums

- Traditional public forum
- Designated public forum
- Limited public forum
- Nonpublic forum





What is a traditional public forum?

Streets
Sidewalks
Parks



- Strongest protection for speech
- Most stringent examination of regulations
- Government may not completely close the forum



What is a designated public forum?

- + Government property that has not traditionally been a public forum
- + Opened by the government to be a public forum



- 📣 University facilities for student groups
 - 📣 Municipal auditorium
 - 📣 City-leased theater
 - 📣 Lamp post
- Strongest protection for speech
 - Most stringent examination of regulations that are content-based
 - Reasonable time, place, & manner restrictions
 - Content-neutral
 - Significant government interest
 - Narrowly tailored
 - Leave open ample alternative channels for communication
 - *But* government may close it at any time

What is a limited public forum?



- Government may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects
- If the government requires speakers seeking access to obtain permission, under pre-established guidelines that impose speaker-based or subject-matter limitations
- Restrictions must be reasonable, content-neutral, & viewpoint neutral



What is a nonpublic forum?

- Not by tradition or designation a forum for public communication
- Government acting as proprietor or managing its internal operations





What about a government FB page?





... it depends

LIMITED PUBLIC FORUM

- √ public may comment
- √ & approval required
- √ public may not comment
- √ clear & consistent application of rules

DESIGNATED PUBLIC FORUM

- √ public may comment
- √ without approval
- √ inconsistent application of rules
- √ no policy or practice of regulating content

You be the judge

- City staff manages the FB page
- They post info about events & public safety
- Live stream City Council meetings
- Only City can “post”
- Anyone can “comment” w/o pre-approval
- City encourages comments
- City posted FB rules
- “inappropriate & prohibited content are subject to immediate removal”





“Inappropriate & prohibited content is a comment:

- ❖ That is not related to the particular article being commented on;
- ❖ Promotes or advertises commercial service, entities or products;
- ❖ Supports or opposes political candidates or ballot propositions;
- ❖ Is obscene;
- ❖ Discusses or encourages illegal activity;
- ❖ Promotes, fosters or perpetuates discrimination on the basis of creed, color, age, religion, marital status, status with regard to public assistance, national origin, physical or mental disability or sexual orientation;
- ❖ Provides information that may potentially compromise the safety or security of the public or public systems;
- ❖ Violates a legal ownership;
- ❖ Sexual content or links to sexual content;
- ❖ Comments from children under 13 cannot be posted in order to comply with the Children’s Online Privacy Act; and
- ❖ Anonymous posts”



The purposes of the off-topic rule:



- ❖ Help the City effectively communicate relevant information
- ❖ Protect the rights of those who want to discuss the info being conveyed
- ❖ Off-topic comments distract from & dilute the important info the City conveys



City removed off-topic comments Commenters sued Claimed City only removed critical comments

6
7
8
9
10
11
12
13
14

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

SARAH HAWES KIMSEY; TARUL KODE
TRIPATHI; and CATHERINE
FREUDENBERG,

Plaintiffs,

v.

CITY OF SAMMAMISH, a municipal
corporation; and CELIA WU, an individual,

Defendants.

No.
COMPLAINT FOR INJUNCTIVE RELIEF
AND DAMAGES

What kind of
forum?
FA violation?



Kimsey v. City of Sammamish

- Designated public forum
- Strict scrutiny because “off topic” rule is content-based
- City’s reasons are not “compelling”
- City enjoined from enforcing “off topic” rule



Kimsey v. City of Sammamish (WDWA 2021)

Here's another one

- DEI Division of University's twitter account

- Social media guidelines:

“When launching a social media account, be prepared to monitor the comments that will get posted. As a public university that values freedom of speech and a robust exchange of ideas, you should err on the side of letting people have their say when commenting on our social media properties. When appropriate, engage with commenters and repliers, even if it's just to like or reply to their comments or to acknowledge their criticism. Don't delete comments or block users because they are critical or because you disagree with the sentiment or viewpoint. But you may remove comments, messages and other communications and restrict access to users who violate the following guidelines: ...”





“• Are violent, obscene, profane, hateful or racist or otherwise use offensive or inappropriate language

- Threaten or defame
- Are out of context, off topic or not relevant to the topic at hand
- Disclose personally identifiable information, such as addresses or phone numbers
- Include copyrighted materials
- Fall under the category of spam
- Suggest or encourage illegal activity
- Solicit, advertise or endorse a third-party business or service
- Are multiple successive posts by a single user
- Are repetitive posts copied and pasted by multiple users

On Facebook, Twitter and Instagram, we have the option of ‘hiding’ spam, inappropriate or off-topic comments, which means it will only be seen by the person who wrote it and their friends.”



- DEI Division Tweeted:

“You can interrupt racism.”

“It sounded like you just said _____. Is that really what you meant?”

- Professor responded: “all men are created equal”
- DEI Division blocked professor
- Professor sued



What kind of forum?

FA violation?



= Limited Public Forum

- University adopted guidelines for posting
- The guidelines were posted online
- The guidelines provided that comments w/in certain categories, including off-topic posts, can be deleted
- The guidelines provided that users who violate the guidelines can be blocked
- No evidence that university was *not* consistently following guidelines
- FA issue will go to the jury

Gilley v. Stabin (D. Or. 2023)



The U.S. Supreme Court speaks 3/15/24



Lindke
v.
Freed



A private citizen & a city leader

Meet James Freed:

- In college, he created a private FB profile
- When he had close to 5,000 friends, he converted to a public “page”
→ anyone can see & comment
- He chose “public figure” for his FB category
- He became City Manager of Port Huron, MI
- He updated his FB page to reflect his new job
- His profile photo was him in a suit with a city lapel pin
- In the “about” section, he added his title, a link to the City’s website & the City’s general email address
- He posted primarily about his personal life
- He also posted info related to his job



Meet Kevin Lindke

- Commented on Freed's FB page
- Criticized the City's approach to the pandemic
- Freed initially deleted Lindke's comments
- Then Freed blocked Lindke
- Lindke sued Freed alleging violation of the FA





Did Freed act as a private citizen or a state official engaged in state action?

- The F.A. only protects against state action
- The Court's new rule → a public official's social media activity = state action 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



Easy to apply? **Nope!**



- Did Freed's job authorize him to post city updates?
- Were his posts about City stuff within his "bailiwick"?
- Did Freed purport to speak on behalf of the City?



So, what can you do to protect public speech from a F.A. claim?

- No public interaction
- The less, the better if your site is interactive
- Post clear, objective, written, rules of decorum
- Rules should warn of consequences
- Apply rules objectively
- Justify your rules by reasons other than disagreement with the speaker's message
- Use the least restrictive response to a violation
- Have a review process for proposed restrictions

What can a public official do to ensure she is speaking in her private capacity?



- Label the social media as a “personal” page
- Include a disclaimer: the views expressed are strictly my own
- Do not use government staff to post

Government may impose narrow limits on a public official's speech



✓ Fighting words

→ Tend to incite an immediate violent response from the audience

✓ True threats

→ Serious expression of intent to commit violence to a particular person or group

✓ Time, place & manner

→ Content-neutral, narrowly-tailored to serve a significant government interest, & leaves open ample alternative channels of communication

X Hyperbole

X Emotional rhetoric



True Threat

YES

- Burning a cross because of its history as a white-supremacist symbol
- “Wanted” posters targeting doctors who performed abortions because doctors in prior “wanted” posters had been murdered

NO

At a rally: “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck”



Time, Place & Manner

Port Commission Mtgs = limited public forum

YES

- Removal of a disruptive individual, NOT because of her views
- Refusal to stay on agenda topic
- No personal attacks
- Time limits

NO

- Disagreement with the views stated
- Selective enforcement
- Prospective exclusion





Hyperbole, Emotional Rhetoric



“Even a statement that appears to threaten violence may not be a true threat if the context indicates that it only expressed political opposition or was emotionally charged rhetoric”

Thunder Studios v. Kazal (9th Cir. 2021)



Questions?



SUMMIT
LAW GROUP

THANK YOU

phone 206.676.7000 | email slg@summitlaw.com | summitlaw.com