SOCIAL MEDIA INFO

Case rulings involving social media postings and whether they constitute speech protected by the First Amendment are still being issued. The latest example is *Marquardt v. Carlton*, Case No. 19-4223, issued by the United States Sixth Circuit Court of Appeals on August 19, 2020.

For background, you probably recall the controversy surrounding the shooting death of Tamir Rice in 2014. Cleveland police officers received an alert that a man was purportedly pointing a gun at people at a Cleveland recreation center. When officers responded to the scene, they shot and killed the suspect. Unfortunately, the suspect turned out to be a twelve-year-old boy, and the "gun" he possessed, while realistic looking, was just a toy.

Much later, in 2016, postings were made on the Facebook page of Jamie Marquardt, a captain in the Cleveland Emergency Medical Services (EMS). The Facebook posts did not identify Marquardt as a City employee, nor were they made during work hours. And the posts were visible only to those whom Marquardt had added as a "friend" on the Facebook platform. They nonetheless came to the attention of Cleveland EMS.

The postings were quite reprehensible. One stated:

> "Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent patrons by pointing a gun at them walking around acting bad. I am upset I did not get the chance to kill the criminal f****r."

Another stated:

> "How would you feel if you were walking in the park and some ghetto rat pointed a gun in your face."

Marquardt claimed he did not make the postings. Instead, he alleged they were made by an acquaintance named Donnie who had access to Marquardt's phone while he slept, and he removed the postings when he realized they had been made. Nonetheless, Marquardt's employment was terminated by the City of Cleveland on March 16, 2016.

The termination was submitted to arbitration. In 2018 Arbitrator Robert Stein ruled that Marquardt shouldn't get his job back, finding his testimony about someone else making the posting to be "implausible." (Marquardt's refusal to provide Donnie's last name probably didn't help his case.)

Marquardt didn't give up. In 2018 he filed a civil rights action in Federal District Court, alleging the termination violated his free speech rights.

His lawsuit was dismissed by the District Court, and he appealed to the Court of Appeals. He won there, sort of.

As the Court of Appeals noted, there is a two-part test to determine if speech is constitutionally protected:

> "We ask first whether the speech was on a "matter of public concern," and if it was, we balance the interests of the employer and employee, asking whether the 'employee's free speech interests outweigh the efficiency interests of the government as an employer.'"

The Court held that Marquardt satisfied the first part; the comments were on a matter of public concern. In this respect, the Court stated the following:

> "[T]he posts on Marquardt's account were more than a "personal beef." Their focus, as distasteful and unpopular as it might be, was that Rice, by then a familiar name to the public, deserved to be shot because he was waving a gun at other people. See *Evans-Marshall*, 624 F.3d at 339 (noting that whether "large segments of the community disagreed" with the speech was not relevant to the public-concern inquiry, which instead asks whether the topic is "'of concern' to the community" (quoting *Connick*, 461 U.S. at 146)). Instead of commenting on a personal grievance, the poster remarked on a "subject of general interest and of value and concern to the public." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (describing a "subject of legitimate news interest"); see also *Roe*, 543 U.S. at 84. Said differently, the posts addressed a "subject" one could envision "stepping up to the microphone" to discuss in the traditional public square."

But the Court's ruling that the comments were a matter of public concern doesn't necessarily mean that Marquardt

has won. Marquardt still has to prove that his free speech interests outweigh the interest of the Cleveland EMS in the efficient administration of its duties. To this end, the Court of Appeals sent the case back to the District Court to decide this issue. Only if that Court decides that his free speech interests outweigh the interests of the Cleveland EMS will the Facebook comments be deemed constitutionally protected.

Marquardt couldn't convince an arbitrator that his termination was without just cause, and he still faces major hurdles in his federal lawsuit. It has been more than four years since he was fired, and a final resolution of his free speech claim could easily still be a few years away. In his favor are the facts that the postings did not identify his employment and his Facebook page was open only to those he had added as "friends" on his page. Still, most employers, and probably quite a few judges, would consider that the interests of the Cleveland EMS in performing its public functions could be jeopardized by the postings and so clearly outweigh his free speech interests. Thus, there remains the possibility that in the end the postings will be found to be not constitutionally protected.

Bottom line? We're sure you have heard this before, but firefighters really need to think twice about what is posted on social media, and maybe even whether they should be on social media to begin with.

Henry Arnett
OAPFF General Counsel