

Public Employee Loses First Amendment Retaliation Claim After Publicly Posting a Racial Slur on Facebook that Caused Sufficient Workplace Disruption

By Leighann K. Fink

The Sixth Circuit Court of Appeals, in *Bennett v. Metro. Gov't of Nashville*, recently addressed the issue of whether a public employee's use of a racial slur when discussing politics on Facebook is sufficiently protected by the First Amendment to outweigh a government agency's interest in having "an efficient workplace and effectively serving the public." On November 9, 2016, Danyelle Bennett, a white woman, publicly posted the following comment on Facebook after the last presidential election: "Thank god we have more America loving rednecks. Red spread across all America. Even niggaz and latinos voted for trump too!" At the time of this post, Bennett was employed with the Emergency Communications Center ("ECC") of the Metropolitan Government of Nashville ("Metro") for sixteen (16) years, and she identified herself in her Facebook profile as an ECC and Metro Police Department Employee. After receiving several complaints from employees and a member of the public, ECC officials "determined that Bennett violated three Civil Service Rules and, after paid administrative leave and a due process hearing, they terminated her from her position."

Bennet filed a lawsuit against Metro for retaliation under the First Amendment. The district court found in favor of Bennett by ruling from the bench that the *Pickering* balancing test, used to determine whether a public employer violated an employee's free-expression rights, weighed in Bennett's favor, after the court reviewed a series of responses to interrogatories, or questions, to the jury regarding the nature of Bennett's speech. Metro appealed the district court's decision to the Sixth Circuit, and, in reversing and remanding the decision of the district court, the Sixth Circuit explained that "[b]ecause Bennett's speech does not occupy 'the highest rung' of public concern [the jury believed the speech at issue was the term "niggaz" and not statements expressing Bennett's view on the election], less of a showing of disruption is required." Further the Sixth Circuit determined that "sufficient disruption was shown to tip the *Pickering* balance towards Metro." The Sixth Circuit also indicated that "[h]ad Bennett's [Facebook] profile been private, or had it not indicated that she worked for Metro, Metro's argument for terminating Bennett would not be as strong."

In concluding that Bennett's speech was not sufficiently protected by the First Amendment in order for the Court to interfere with Metro's "sufficient discretion to manage their operations," the Sixth Circuit quoted Justice John Paul Stevens, stating, "we also hope that whenever we decide that intolerant speech should be restricted, it is understood that we do so with no less commitment to the value of tolerance and the First Amendment in which it is enshrined."

This decision is applicable to all public entities within the Sixth Circuit's jurisdiction, including Ohio, and could potentially impact disciplinary situations in the workplace. Please contact any of the listed attorneys regarding this decision. We welcome any questions.

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