

STATE OF MICHIGAN
COURT OF APPEALS

Theron E. Hughes,

Plaintiff-Appellant,

v

Arthur Timko,

Defendant-Appellee.

UNPUBLISHED
February 28, 2006

No. 255229
Washtenaw Circuit Court
LC No. 03-000598-NZ

Before: Sawyer, P.J., and Talbot and Borello, JJ.

Talbot, J (*dissenting*).

Under the balancing test set forth by the United States Supreme Court in *Pickering v Board of Education*, 391 US 563; 88 S Ct 1731; 20 L Ed 2d 811 (1968), I believe that plaintiff's First Amendment interests do not outweigh defendant's interest in operating a public radio station according to the legitimate goal of its mission statement. I, therefore, respectfully dissent.

As an initial matter, I do not disagree with the majority's conclusion that the speech at issue in this case involves matters of public concern. As in *Pickering*, however, the problem here "is to arrive at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." *Id.* at 568. In *Pickering*, the Court discussed several factors that should be weighed when arriving at this balance, which include whether the statements were directed toward any person with whom the employee would normally be in contact during the course of his daily work, whether the employment relationship requires a high level of personal loyalty and confidentiality such that the speech at issue will prevent this relationship from functioning properly, and whether the speech interferes with the proper performance of the employee's duties or with the regular operation of the organization. *Id.* at 569-571. These factors, however, were not intended to be an all-inclusive list, and the Circuits have modified this test and developed factors as the facts of particular cases have warranted.

The majority used a list a factors developed by the Fourth Circuit in *McVey v Stacy*, 157 F3d 271, 278 (CA 4, 1998). Because we are in Michigan, however, I believe it is more appropriate to use the factors as developed by the Sixth Circuit. In *Solomon v Royal Oak Twp*, 842 F2d 862, 865 (CA 6, 1988), the Court stated that the "factors include whether the speech: related to an issue of public interest and concern; was likely to foment controversy and disruption; impeded the department's general performance and operation; affected loyalty and

confidence necessary to the department's proper functioning; subverted department discipline; was false and the employer could not have easily rebutted or corrected the errors; and was directed toward a person whom the speaker normally contacted within the course of daily work." Because not all of these factors readily apply to the facts of the case at bar, it would be helpful to supplement this test with a more recent formulation of the factors.

Factors to be considered in balancing the employee's and employer's respective interests include whether an employee's comments: (1) meaningfully interfered with the performance of his duties; (2) undermined a legitimate goal or mission of the employer; (3) created disharmony among co-workers; (4) impaired discipline by superiors; or (5) destroyed the relationship of loyalty and trust required of confidential employees. [*Akridge v Wilkinson*, 351 F Supp 2d 750, 760-761 (SD Ohio, 2004), citing *Rodgers v Banks*, 344 F3d 587, 601 (CA6, 2003).]

Applying these factors to the present case, it is clear that plaintiff's speech meaningfully interfered with the performance of his duties. Plaintiff was directed to not only report news of the war in Iraq every hour during his radio show, but also to refrain from expressing his personal views on political issues on the air. Plaintiff blatantly defied both of these directives by expressly refusing to read the NPR newscasts and then maligning NPR news over the airwaves of an NPR station. Plaintiff went on to express his personal opinions about other news networks, the war in Iraq, Saddam Hussein, and even the French and Canadians. WEMU has a statement of purpose that had been adopted in 1976, which contains a clear policy on neutrality:

WEMU and WEMU staff must maintain total neutrality in news and public affairs programs. . . . Indeed, WEMU should jealously guard its neutrality and, hence, its vitality as a place where every view and taste is respectfully heard. Further, by making WEMU open to all views and all publics without discrimination of favor, it can maintain neutrality and vitality.

Plaintiff's on-air statements clearly violated WEMU's policy on neutrality and, therefore, undermined the station's legitimate mission. Although there had been no evidence presented that plaintiff's statement created disharmony among his coworkers, plaintiff's comments were likely to foment controversy and disruption, as evidenced by the listener complaint sent in to the radio station. Also, although loyalty and confidence do not appear to be requisites to the functioning of a radio station, plaintiff's disregard of station policy certainly has the potential to impair discipline by superiors.

In my research, I have been unable to discover another case directly on point, but, of the published opinions I have found, the facts in *Mills v Steger*, 179 F Supp 2d 637 (WD Va, 2002), most closely parallel those of the present case. There, the plaintiff was employed by Virginia Polytechnic Institute and State University (Virginia Tech) as the station manager for WVTF, a public radio station, operated by the Virginia Tech Foundation. *Id.* at 639. Due to poor ratings, the plaintiff cancelled WVTF's Saturday Metropolitan Opera radio show, which prompted opera fans to lodge complaints directly with the plaintiff's supervisors at Virginia Tech, who, in turn, directed the plaintiff to put the Metropolitan Opera back on the air. The plaintiff, upset with the administrators' reluctance to stand up against pressure from the opera fans, drafted a letter, which criticized the administrators who "had no experience in broadcasting" and whose actions

“would make us all look like fools.” *Id.* at 640. The plaintiff distributed this letter to all of the WVTF staff, but it “unexplainably” reached the media, which then contacted plaintiff for comment. In his statements to the media, the plaintiff “accused Virginia Tech of violating FCC regulations by unduly interfering with programming decisions” and “was quoted in the Roanoke Times as saying ‘I think I speak for the staff when I say we do not know how to function.’” The plaintiff also referred to the opera fans who complained as “opera nazis.” The plaintiff’s statements to the media ultimately led to his termination as station manager. *Id.* at 641.

The Court found that the factors relevant to the plaintiff’s speech against the radio station include “whether the employee’s speech (1) impairs discipline by superiors; (2) impairs harmony among co-workers; (3) has a detrimental impact on close working relationships; (4) impedes the performance of the public employee’s duties; (5) interferes with the operation of the agency; (6) undermines the mission of the agency; (7) is communicated to the public or to co-workers in private; (8) conflicts with the responsibilities of the employee within the agency; and (9) makes use of the authority and public accountability the employee’s role entails.” *Id.* at 647, quoting *McVey, supra* at 278 (quotation marks omitted). The Court held that, although the defendant administrators had not produced enough evidence to show that the plaintiff’s speech actually created a disturbance,

[I]t is not necessary “for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.” Mills’ public statements certainly had the potential to create a public relations problem for WVTF and destroy the working relationships between Mills and his supervisors. Thus, WVTF did not have to wait before taking action. [*Id.* at 648, quoting *Connick v Myers*, 461 US 138, 152; 103 S Ct 1684; 75 L Ed 2d 708 (1983).]

Likewise, the e-mail complaint lodged with WEMU in the present case shows a clear potential for plaintiff’s statements to cause a public relations problem for the station. The fact that plaintiff expressed his opinions to the public makes it far more difficult for the station to address any disharmony they may have caused than if he had simply expressed them to coworkers in private. Plaintiff’s statements denigrated the very newscasts that WEMU had scheduled to provide its listeners with continual coverage of the war in Iraq. Thus, plaintiff’s statements not only conflicted with his responsibilities to the station, but also undermined the station’s mission and policies. Drawing parallels to *Mills*, plaintiff’s actions here appear even more egregious when one considers that fact that plaintiff used to the radio station’s own airwaves to violate its policy, as opposed to disseminating his opinions through some other willing media outlet, like the plaintiff in *Mills*.

“[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency.” [*Connick, supra* at 151, quoting *Arnett v Kennedy*, 416 US 134, 168; 94 S Ct 1633, 1651; 40 L Ed 2d 15 (1974).]

With this in mind, I do not believe plaintiff's First Amendment interests in being permitted to use a public radio station to espouse his own personal opinions across the airwaves outweigh defendant's interest in operating WEMU according to its mission statement. I do not believe the trial court erred in granting summary disposition in favor of defendant, and I would, therefore, affirm its order dismissing plaintiff's complaint.

/s/ Michael J. Talbot