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1st Amendment A Weapon In Cases Involving Public Workers

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practice point

Recent cases demonstrate that the First Amendment can be a major weapon in obtaining injunctive relief in Massachusetts courts against state and local employers who apply "image-conscious" sanctions to employees or job applicants.On March 8, U.S. District Court Judge Reginald C. Lindsay issued a bench decision adopting a holding by the 11th U.S. Circuit Court of Appeals that "the dating relationship is a right protected by the First Amendment."

Lindsay ordered the State Police not to withdraw an offer of employment to a police academy recruit, stating that she had a right to date a man who had served time for a felony conviction.

Just a week earlier, U.S. District Court Judge George A. O'Toole Jr. had issued a similar order prohibiting the State Police from terminating a recruit merely because he owned an interest in an adult bookstore.

Shannon Liss-Riordan of Boston, counsel for the recruits in both cases, said these disputes were just two of several recent examples of First Amendment application to employment law conflicts with state and local agencies.

She said the cases were particularly instructive for Massachusetts attorneys because there was no precedent applicable in the 1st U.S. Circuit Court of Appeals.

Liss-Riordan also noted that the judges both recognized that any limitations on First Amendment rights can constitute "irreparable injury" and affect the balancing of interests necessary for an injunction.

"These are important precedents," she added. "They reinforce basic rights that public employers aren't thinking about when making employment-related decisions."

Liss-Riordan also said she has been flooded with calls and questions from other potential plaintiffs in the wake of these local rulings.

Recent Cases

Liss-Riordan suggested that many people are not aware that equal protection and state action doctrines provide much broader protections for state employees than those in the private sector.

But the recent decisions in *O'Neill v. Commonwealth* and *Moore v. Commonwealth* have clarified the scope of employee and applicant rights in an age of rapidly growing political correctness.

The state police had advised Eugene O'Neill, a recent recruit, to divest himself of an ownership interest in two adult bookstores before he could be appointed to the force.

After an injunction hearing, the judge found that "O'Neill's passive ownership of an interest in adult bookstores has no direct relationship to his ability to perform satisfactorily the duties of a member of the State Police."

The judge noted the police arguments that such bookstores are often the subject of local litigation that could create a conflict of interest and offend female troopers.

But O'Toole stated that a balancing of interests involving First Amendment rights of expression requires solid substantiation of "projected harms."

The judge concluded, "The intent to assure that the workplace is free of sexual harassment is a laudable one, but the defendants' fear that the employment of O'Neill will endanger that goal rests only on speculation. Likewise, the danger of actual conflict of interest is ... conjectural."

Liss-Riordan said the decision was partly based on decisions from other circuits as there was no local precedent on point, and she noted one California case in which a fireman was allowed to read Playboy at the fire station as long as he kept it to himself.

She added that O'Toole recognized that "any deprivation of First Amendment rights automatically creates irreparable harm for purposes of obtaining an injunction," and he saw that "there were no violations or arrests concerning the bookstores."

In the case of female police recruit, Stacey Moore, the police argued that her boyfriend was a convicted felon and could not legally have access to a

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gun that Moore would likely have to keep in her home at all hours.

"The police said her dating relationship was not constitutionally protected and also tried to argue that First Amendment protections did not apply to people who were not yet employees," said Liss-Riordan.

But the judge said, "the protection of First Amendment rights applies to people who are seeking to be employed as well as to those already employed."

He also noted a conflict in the circuits concerning the protections extended to dating relationships, but held that the dating relationship in question was an "intimate association" protected by law.

The judge said that "the balance of harm favors this plaintiff," and suggested the police should consider a policy to "balance the interests on both sides."

Liss-Riordan said that "expressive associations" for the purpose of political speech have long been protected but dating relationships have more recently received protection as "intimate associations."

She also brought an injunction action against the City of Boston several months ago when city employees were disciplined for wearing buttons with political expressions such as "Money for Fenway, but not for City Workers."

She said the city settled the case by removing the disciplinary actions.

Now, Liss-Riordan is engaged in another battle in *Rosenberg v. City of Everett* that involves a city employee and local television director who refused to express public support for the mayor in a political battle.

An artist's sketch depicts U.S. District Court Judge George A. O'Toole Jr. hearing arguments from attorney Shannon Liss-Riordan in the case of *Commonwealth v. O'Neill.*

Practical Issues

Liss-Riordan said there are many practical issues that lawyers should consider in bringing actions against state and local agencies for injunctive relief.

"You have to remember it's hard to get a preliminary injunction. You have to show a likelihood of success on the merits, a risk of irreparable harm, a balance of equities in your favor and a public interest on your side," she explained.

But Liss-Riordan suggested that "you can often get immediate relief when the First Amendment is at stake" because recent local cases demonstrate that "irreparable harm and public interest are present in cases involving freedom of expression or freedom of association."

She also noted that "speech on public concerns, intimate associations, expressive associations, and creative expression, such as nude dancing, are all protected activities."

But Liss-Riordan added that preliminary injunction practice is one of the hardest things a lawyer can do.

"You are compressing the entire litigation into a very short period, and you have to put everything else aside to focus on one case and prove likelihood of success on the merits," she said.

Handling the case of Stacey Moore, Liss-Riordan filed the case on a Wednesday, got a hearing on Thursday and got a ruling on Friday.

"You can get to federal court very quickly with these cases. The state courts are jammed up, and it is difficult to set a hearing on one issue. The federal court has an emergency rotation, and if the assigned judge can't hear it, an emergency judge can," she noted.

She recalled giving extra effort to such emergency hearings when she was a law clerk to a federal judge, and said, "You will get a very thorough hearing, but you get some hard and thorough questioning, and the judge may even want live testimony in some cases."

Liss-Riordan said that injunction practice was a bit like trying to get a summary judgment in three days.

Commenting on the potential size of this practice, she said, "There's a huge number of public employees out there, but you have to be very selective about the kind of actions you want to bring because they can eat up all of your time."

For a court transcript of the restraining order hearing in *Moore v. Commonwealth*, visit the "Important Documents" section of Lawyers Weekly's website, www.masslawyersweekly.com. MLW

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