Ninth Circuit Rules That Officials May Violate First Amendment By Blocking Persons from Private Social Media Used for Government Business

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In *Garnier v. O'Connor-Ratcliffe*, the 9th Circuit held that two defendant public school district board members violated the First Amendment rights of the plaintiffs by blocking them on the Twitter and Facebook pages that the school board members had created and then used to communicate with their constituents.

Key Takeaways

- Blocking persons from social media that a public official uses for governmental business, which may include informing constituents about goings-on at the agency, inviting the public to public meetings, or soliciting input about specific policies or decisions, likely violates the First Amendment.
- Blocking of specific posts or comments based on the viewpoint of the speaker, likely violates the First Amendment.
- Public officials who post about agency business and are concerned about liability may want to limit – in a manner that does not discriminate based on viewpoint – the ability of the public to interact with their social media posts.
- Courts are still catching up with officials' abilities to interact with the public on social media. If a public official uses social media to discuss agency business, they should seek guidance from their agency counsel about which restrictions they can impose and how they may be enforced, as selective enforcement is likely problematic.

Facts

The defendant board members originally used their social media pages to promote their political campaigns. After being elected, the officials updated their social media pages to refer to their governmental positions; they continued to use those pages to post content related to school district business and the activities of the board. The officials used Twitter and Facebook to inform constituents about goings-on at the school district, invite the public to Board meetings, solicit input about specific policies or decisions, and

communicate with parents about safety and security issues at the district's schools. The plaintiffs were parents that attended meetings and were vocal critics of the school board, and became serial commenters on the two board member's social media, posting comments about alleged wrongdoing by the superintendent, the governance of board, and race relations issues at the school district. The board members began deleting or hiding the comments on Facebook and Twitter. One of the board members eventually blocked the plaintiffs on Facebook and Twitter; the other board member blocked the plaintiffs on Facebook. Thereafter, defendants used Facebook's "word filter" feature to prohibit the use of most common English words, which effectively blocked all verbal comments from any members of the public, but did not unblock the plaintiffs.

Analysis

Under federal civil rights law (42 U.S.C § 1983), public officials are only liable for violating the civil rights of others if they are acting "under color of state law," which typically requires the plaintiff to prove that the official's offending actions are fairly attributable to the state and that the defendant is not acting as a private citizen. Here, the Ninth Circuit noted the close nexus between the defendants' use of social media and their official positions, as the defendants had identified themselves as board members on the social media page, the content of the social media related to the conduct of agency business, and there were no disclaimers noting that the pages were personal pages of the board members and that comments were not in an official capacity. The fact that the social media pages were started by the defendants during political campaigns was not sufficient to make their use of social media private conduct, nor was the intent of the board members to use the social media primarily as one-way communication, because it was not what the board members did in practice.

Additionally, the Ninth Circuit recognized that social media was inherently compatible with expressive activity. The Court noted that, where an official has made a forum "available for use by the public" and "has no policy or practice of regulating the content" posted to that forum, it has created a designated public forum. In such forums, restrictions must be narrowly tailored to serve a significant government interest and must leave open alternative channels for communication, usually limited to content-neutral time, place, and manner restrictions. The Court remarked that Twitter pages are a designated public forum, as were the officials' Facebook pages prior to the use of the "word filter" to turn off public commenting. Lastly, the Court determined that blocking of the plaintiffs was not narrowly tailored, as it blocked more speech by plaintiffs than was necessary, and that the board members' asserted interests in prohibiting repetitive comments was not a significant governmental interest in

light of the fact that the comments did not actually impede or disrupt the officials' use of social media to get out their own messages.

The Court further determined that using technological features to effectively limit or turn off public comments may instead create a limited public forum. In such forums, restrictions need only be viewpoint neutral and reasonable in light of the forum, but must still be unambiguous and definite. However, the Court found that continuing to block the plaintiffs from being able to post only non-verbal emoji responses served no purpose, and was not reasonable in light of the purpose of the forum. The defendant board members could not thus continue to block the plaintiffs from their Facebook pages after turning off the ability to make response comments.