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There Is No 'Hate Speech' Exception to the First Amendment

OP-ED: Decisions based on judges' personal views of what constitutes acceptable political speech are not only inconsistent with the First Amendment, but undermine the rule of law.

By **Randall J. Peach** | May 27, 2022

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In a recent employment case, the Appellate Division seems to have reached the stunning conclusion that speech alleged to be racist is not protected by the First Amendment.

McVey v. Atlanticare Medical System Inc., issued for publication on May 20, involved an employee who was fired in 2020 after posting comments on Facebook criticizing the Black Lives Matter (BLM) movement. In affirming the dismissal of the plaintiff's wrongful discharge claim, the panel ruled that an employer does not violate a clear mandate of public policy under the Pierce doctrine when it fires a worker for controversial social media posts.

The panel begins its analysis on solid ground, emphasizing the plaintiff's inability to demonstrate the "state action" necessary to make out a First Amendment claim, where the company was a private employer. The panel also cited the terms of the company's social media policy, which forbade workers from speaking out on political issues while identifying as a company employee.

So far, so good. But toward the end of its opinion, the panel makes this surprising remark: "[O]ur Supreme Court held over twenty years ago that racist remarks are not protected by the First Amendment or [] the New Jersey Constitution."

The judges then went on to describe how, in their view, the content of plaintiff's criticisms of BLM "crossed that line" into unprotected speech: "She [the plaintiff] stated that the phrase 'Black Lives Matter' was 'racist'; the movement 'causes segregation'; and Black citizens were 'not dying … they are killing themselves.'"

But in fact, there is no "hate speech" exception to the First Amendment, even presuming one could define the term. Speech that is insensitive, offensive or even racist still enjoys constitutional protection. In claiming otherwise, the panel cites to *Karins v. Atlantic City*, 152 N.J. 532 (1998), but *Karins* does not stand for the proposition that alleged hate speech may be constitutionally proscribed—which would be contrary to longstanding precedent.

In *Karins*, the Supreme Court addressed the competing interests involved in a case where an off-duty firefighter had directed a racial epithet at a police officer. In a lengthy analysis, the court carefully balanced the firefighter's free speech rights with the government's interest in maintaining order and discipline in its work force. The court correctly focused on the fact that, in uttering the slur, the firefighter was clearly not engaged in debating matters of public importance; rather, he had simply directed a discriminatory remark at another public employee.

The plaintiff in *McVey,* by contrast, did not utter a racial slur against anyone, but had professed her political opinions publicly, on social media. Moreover, she was speaking out on a matter of public importance: the mass protests which had arisen after the murder of George Floyd by a police officer. Yet instead of grappling with these free speech issues—as the Court did in *Karins*—the panel concludes that BLM criticism is simply too offensive to be constitutionally protected.

Such a finding is problematic to say the least. To begin with, who decides whether a social media post—including one expressed in race-neutral terms—is in fact racist, and thus unacceptable? And what standard is applied? Here, the panel unquestioningly accepts the proposition that plaintiff, by calling BLM racist, and opining that the movement "causes segregation," was herself engaged in racism. Because the posts did not literally express racist beliefs about Black people (in fact, the plaintiff professed that she did not discriminate, and supported "all lives"), the panel cited the company's argument that the posts were nonetheless a "racist dog whistle." That is, racism could be implied from the posts even in the absence of expressly racist sentiments.

This is dangerous ground for a court to tread on. One might certainly make the argument that the plaintiff's opinions about BLM were insensitive or even offensive; they were certainly clumsily asserted. On the other hand, you could also make the case that BLM as a societal movement should perhaps be open to critique, as many (including some Black writers) have responsibly argued. What is troubling here is to find judges suddenly taking sides on controversial social issues; to claim the power to decide which political arguments are in fact "crossing the line" (in the words of the panel) into speech which should lose constitutional protection because of its disfavored content.

The panel could have restricted its analysis to the absence of a state actor in the case, or the limits of the Pierce doctrine's protections, particularly where the plaintiff's posts had identified her as a company employee, in violation of company policy. Instead, the opinion very strongly reflects the judges' personal view that criticism of BLM is simply beyond the pale, from a free speech standpoint. According to the panel, BLM is solely a positive phenomenon—the panel actually quotes from a favorable dictionary definition of the movement—and no dissent from this view is permitted.

Particularly at a time when we face such intense divisiveness as a society, is this really the path we want our courts to start going down? Decisions based on judges' personal views of what constitutes acceptable political speech are not only inconsistent with the First Amendment, but undermine the rule of law.

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