Received 5/24/2019 10:58:08 AM Supreme Court Middle District

Filed 5/24/2019 10:58:00 AM Supreme Court Middle District
3 MAP 2019

In the Supreme Court of Pennsylvania

NO. 3 MAP 2019

RACHEL L. CARR,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION and COMMONWEALTH OF PENNSYLVANIA, STATE CIVIL SERVICE COMMISSION

APPEAL OF: PENNSYLVANIA DEPARTMENT OF TRANSPORTATION

REPLY BRIEF FOR APPELLANT

Appeal from the Order of the Commonwealth Court at No. 380 MD 2017 dated June 12, 2018, which reversed the adjudication of the State Civil Service Commission, entered August 1, 2017, at Appeal No. 29058

Denise J. Smyler
General Counsel

Jason D. Sharp
Chief Counsel

Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel—Western Region
301 5th Avenue, Suite 210
Pittsburgh, PA 15222
Telephone No. (412) 565-7555

Eric J. Jackson
Assistant Chief Counsel

Nicholas D. Mertens
Assistant Counsel

May 24, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — PAGE(S)

MISCELLANEOUS

SUMMARY OF ARGUMENT

Carr and the Electronic Privacy Information Center ("EPIC") both rely upon the U.S. Supreme Court's decision in *Rankin*, which is factually distinguishable from the speech at issue in the present matter. Additionally, Carr misconstrues the precedent established by this Honorable Court in *Sacks* and attempts to alter the public importance factor which, as a matter of law, was erroneously applied by the Commonwealth Court below.

Furthermore, the Brief submitted by EPIC, as *amicus curiae*, confuses the Department's interest *as an employer* with overarching concerns involving government surveillance of social media. Decades of precedent provide that a public employer has a greater interest in regulating the speech of its employees compared to that of the public. In particular, EPIC ignores the significant potential for harm to the Department's interests as an employer caused by Carr's over-the-top and violent Facebook comments that she "[does not] give a flying shit about those babies and [ ] will gladly smash into a school bus."

ARGUMENT

I. *Rankin v. McPherson* is factually distinguishable from the present matter.

Both Carr and EPIC, as *amicus curiae*, reference the U.S. Supreme Court's decision in *Rankin v. McPherson*, 483 U.S. 378 (1987), to support the conclusion that the Commonwealth Court did not commit reversible error. EPIC goes even further to compare Carr's Facebook comments to private conversations such as those involved in *Rankin*. However, the speech involved in *Rankin* is diametrically opposed to that in the present matter.

In *Rankin*, the U.S. Supreme Court examined and applied the *Pickering v. Board of Education*, 391 U.S. 563 (1968), balancing test to find that McPherson, a public employee employed by the Harris County (Texas) Sheriff's Office, was protected by the First Amendment. The public employee, after learning of the attempted assassination of President Ronald Reagan, said "if they go for him again, I hope they get him." 483 U.S. at 381. The comment occurred between two co-workers and was overheard by a third employee within the confines of the office. *Id.* In reviewing the context of the speech, the Court held that it addressed a matter of public concern—the statement was made during the course of discussing the policy of the President's administration. *Id.* at 386. The Harris County Sheriff's Office justified its termination of McPherson solely based upon its conclusion that, as a

result of her comments, she was "not a suitable employee to have in a law enforcement agency." *Id.* at 390.

In applying the *Pickering* balancing test, the *Rankin* Court determined that the test weighed towards the public employee because there was no danger that the employee's speech could discredit her employer. *Id.* at 389. Significantly, the statement was made in the workplace, there was no evidence that anyone overheard her comments other than two co-workers, and most importantly she worked in an area that the public could not access when she made her comments. *Id.*

The time, place, and manner of Carr's Facebook comments stand in sharp contrast with those in *Rankin*. EPIC contends comments made to a closed group, such as the Facebook group in the present matter, are meant for "the select few who are members of the group." (*Amicus* Brief (EPIC), p. 14). However, as the record below demonstrates, Carr intended to share her rant with all 1,359 individual Facebook members in the "Creeps Of Peeps" Group.[1] (R.R. 107a–08a, 184a). By contrast, the inappropriate comments made by the employee involved in *Rankin* were spoken in a private space within the workplace.

[1] It is also critical to note that while the "Creeps Of Peeps" group is considered a closed group, any Facebook member may request to join pending approval by either a group administrator or group member. Facebook, *What are the privacy settings for groups?*, https://www.facebook.com/help/220336891328465. While the "Creeps Of Peeps" group may contain the same amount of members as the readership of a small newspaper, in theory, a Facebook group can have unlimited members. In fact, as of May 2019, there are numerous Facebook groups with over 100,000 members.

Most importantly, the speech in *Rankin* occurred in an area to which the public did not have access, and therefore, any harm to the government, as an employer, was not reasonably likely to occur as the result of her private speech. As such, the potential for McPherson's comments to harm her employer were merely speculative because it would have been highly unlikely that anyone from the general public would have ever heard them. By contrast, Carr shared her rant with nearly 1,400 other Facebook members—which as the Commonwealth Court notes "can propel the post into a state of abject permanence on the Internet." *Carr v. Commonwealth*, 189 A.3d 1, 16 n.18 (Pa. Cmwlth. 2018). Had Carr's comments been merely uttered to a co-worker, as in *Rankin*, then the scales might tip towards her because the likelihood of causing harm to the Department's interest, as her employer, would be mitigated by the limited nature of the dissemination. However, Carr chose to share her over-the-top and violent rant with a wide audience *via* social media.

II. The Commonwealth Court and Carr both ignore this Honorable Court's mandate in *Sacks* to consider the public importance, or lack thereof, of the speech in question.

Carr claims that the "Department attempts to muddy the waters of the analysis by placing the issue of 'touching on a matter of public concern,' which under all precedent is the *initial* inquiry . . . into a balancing test between an employee's interest in speaking weighed against the government's interest as an employer." (Appellee's Brief, p. 22 (emphasis in original)). In making this claim, Carr attempts

to unilaterally alter the plain language of this Honorable Court's decision in *Sacks v. Commonwealth*, 465 A.2d 981 (Pa. 1983).

The *Sacks* decision, which was decided after *Connick v. Myers*, 461 U.S. 138 (1983), uses the terms "public concern" and "public importance" interchangeably. This Honorable Court clearly established that a review of the "public importance" of the speech in question is a relevant factor to both the *Connick* analysis and the *Pickering* balancing test. *Sacks*, 465 A.2d at 989. This is demonstrated by Section III-C of the decision in *Sacks*. *Id.* The initial inquiry provides that "[i]f the speech has no element of public importance, then the analysis [discussed above] will not apply, and the speech should be treated merely as an ordinary complaint about the work place." *Id.* This Honorable Court's analysis in *Sacks* is entirely in line with *Connick*, but merely substitutes "public concern" with "public importance."

Under *Sacks,* however, an inquiry into the public importance of the speech does not stop with the *Connick* analysis. The plain language of *Sacks* demonstrates that a reviewing court, when engaging in a *Pickering* balancing test, must consider three factors: "**I. the public importance of the speech**; II. the nature of the injury to the agency; III. factors which may mitigate or aggravate the injury to the agency." *Id.* (emphasis added). *Sacks* then goes on to state that as the importance of the speech decreases, so does the government's burden of demonstrating injury and *vice versa*. *Id.*

If the speech in question is of no public importance (or public concern) then the inquiry stops there—as there is no First Amendment protection for public employee speech that is devoid of public concern. However, *Sacks* demonstrates that an inquiry into the public importance of the speech must also be considered when weighing the various interests involved. Carr's reading of *Sacks* would alter the standard established by this Honorable Court. It would further disregard weighing the public's interest, or lack thereof, in "receiving the well-informed views of government employees engaging in civic discussion." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). The Commonwealth Court committed reversible error when it failed to consider the fact that Carr's Facebook comments had little to no value to the public—despite the fact that the Commonwealth Court concluded that her speech "seemingly provides little to the marketplace of ideas." *Carr*, 189 A.3d at 12.

III. EPIC, as *amicus curiae*, overtly ignores the potential harm caused by Carr's Facebook comments when weighed against the Department's interests, acting as Carr's employer.

In its *amicus curiae* Brief, in support of Carr, EPIC correctly points out that social media websites, such as Facebook, have become the "modern public square." *Packingham v. North Carolina*, 582 U.S. ---, 137 S. Ct. 1730, 1737 (2017). However, EPIC ignores the fact that speech, even within the confines of the modern public square, is not absolute—especially when dealing with speech by public employees. *See Garcetti*, 547 U.S. at 418 ("When a citizen enters government

service, the citizen by necessity must accept certain limitations on his or her freedom."). As the U.S. Supreme Court stated in *Packingham*: "[social media websites] allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" 137 S. Ct. at 1737 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)). Such a platform has a wide variety of uses: sharing photographs with friends, catching up on the latest news, discussing politics, checking employment ads, or sharing potentially harmful rants. While social media has many significant benefits to modern society, its potential to harm the interests of employers cannot be overlooked or ignored. *See Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017) (discussed in the Department's Main Brief, pages 16–18); *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1303 (N.D. Ga. 2014) (public employee's "choice to place [their speech] on a social media platform risked sharing it with a much broader audience."). EPIC blatantly ignores the significant potential for harm posed in the present matter.

Furthermore, EPIC's conclusion that if this Honorable Court rules for the Department—"it will encourage government supervisors to pursue invasive surveillance to monitor the private and semi-private posts of government employees across social media"—is not supported by the record nor is it a logical conclusion of the Department's requested relief. (*Amicus* Brief (EPIC), p. 17). Indeed, here the Department was not monitoring Carr's posts. Rather, Carr's rants drove concerned

Facebook participants to bring her statements to the Department's attention. (R.R. 64a, 185a–87a).

EPIC's concern ignores the framework established by *Pickering* and its progeny and this Honorable Court's decision in *Sacks*, which balances the interests of the employee, speaking as a citizen, with that of the government, acting as an employer, "in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The mere fact that a supervisor would disapprove of an employee's opinion does not permit a governmental employer to take adverse action against an employee. It must still be demonstrated that the speech in question has the potential to impact the employer's operations. *See Garcetti*, 547 U.S. at 418 (Actual disruption is not necessary provided that the speech "has some potential to affect the entity's operations.").

Despite EPIC's claims that the present matter presents *1984*-esque concerns of "Big Brother," caselaw provides an adequate protection against the actions of public employers that would otherwise chill protected speech on social media or through any other medium. George Orwell, *1984* (1949). EPIC claims that its concerns are not merely speculative, but probable, based upon a Freedom of Information Act proceeding involving the U.S. Department of Homeland Security monitoring, *inter alia*, social media websites. However, this line of reasoning ignores the clear fact that, unlike the U.S. Department of Homeland Security, the

Pennsylvania Department of Transportation is not a law enforcement agency nor does it conduct any type of surveillance of Pennsylvania residents. More importantly, in the present matter, the Commonwealth of Pennsylvania, through the Department of Transportation, is acting solely within its powers as an employer and not within its police powers. *See City of San Diego v. Roe*, 543 U.S. 77, 80 (2004) ("a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public"); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 474 (3d Cir. 2015) ("It is well established that a government has broader powers to regulate speech when it acts as an employer than when it acts as a sovereign."). As such, EPIC's concerns are purely speculative, ignore the Department's interest as a public employer and, most importantly, are not supported by the record in the present matter.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania, Department of Transportation, respectfully requests that this Honorable Court REVERSE the decision of the Commonwealth Court of Pennsylvania, which reversed the adjudication of the State Civil Service Commission.

Respectfully submitted,

Denise J. Smyler
General Counsel

Jason D. Sharp
Chief Counsel

Eric J. Jackson
Assistant Chief Counsel

/s/ Nicholas D. Mertens
Nicholas D. Mertens
Assistant Counsel
Supreme Court ID # 313998

Commonwealth of Pennsylvania
Department of Transportation
Office of Chief Counsel—Western Region
301 5th Avenue, Suite 210
Pittsburgh, PA 15222
Telephone No. (412) 565-7555

May 24, 2019

CERTIFICATE OF COMPLIANCE—PUBLIC ACCESS POLICY

I hereby certify, on this 24th day of May 2019, that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Nicholas D. Mertens
Nicholas D. Mertens
Assistant Counsel
Supreme Court ID # 313998

Received 5/24/2019 10:58:08 AM Supreme Court Middle District

Filed 5/24/2019 10:58:00 AM Supreme Court Middle District
3 MAP 2019

IN THE SUPREME COURT OF PENNSYLVANIA

Rachel L. Carr	:	3 MAP 2019
v.	:	
Commonwealth of Pennsylvania, Department of Transportation and Commonwealth of Pennsylvania, State Civil Service Commission	:	
Appeal of: Pennsylvania Department of Transportation		

PROOF OF SERVICE

I hereby certify that this 24th day of May, 2019, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

Served:	Kyle Bruce Milliron
Service Method:	eService
Email:	milliron.kyle@gmail.com
Service Date:	5/24/2019
Address:	794 1/2 South Kendall Avenue Bradford, PA 16701
Phone:	904--65-2-3246
Representing:	Appellee Rachel L. Carr

IN THE SUPREME COURT OF PENNSYLVANIA

PROOF OF SERVICE

(Continued)

Courtesy Copy

Served:	Marc Rotenberg
Service Method:	Commercial Carrier: UPS
Service Date:	5/24/2019
Address:	1718 Connecticut Avenue, N.W. Suite 200 Washington, DC 20009
Phone:	--
Representing:	Amicus Curiae Electronic Privacy Information Center

Served:	Michael McAuliffe Miller
Service Method:	eService
Email:	mmiller@eckertseamans.com
Service Date:	5/24/2019
Address:	213 Market Street 8th Floor Harrisburg, PA 17101-2141
Phone:	717-.23-7.7174
Representing:	Amicus Curiae County Commissioners Association of Pennsylvania, et al

Served:	Tricia Snyder Springer
Service Method:	eService
Email:	tspringer@eckertseamans.com
Service Date:	5/24/2019
Address:	213 Market Street 8th Floor Harrisburg, PA 17101
Phone:	717--23-7-7189
Representing:	Amicus Curiae County Commissioners Association of Pennsylvania, et al

IN THE SUPREME COURT OF PENNSYLVANIA

/s/ Nicholas Daniel Mertens

(Signature of Person Serving)

Person Serving:	Mertens, Nicholas Daniel
Attorney Registration No:	313998
Law Firm:	Pennsylvania Department of Transportation
Address:	Penndot Ogc 301 5TH Ave Ste 210 Pittsburgh, PA 15222
Representing:	Appellant Department of Transportation