BoardmanClark

Municipal Law Newsletter

VOLUME 29, ISSUE 3 MAY/JUNE 2024

In this issue

Read us online at:
BOARDMANCLARK.COM/PUBLICATIONS

Lindke v. Freed: When Does an Official's Use of Social Media Become State Action?

Over the years, social media has become a common component of public service, keeping officials connected both formally and informally to the public they serve. As more official business is being conducted on social media platforms like Facebook, Instagram, and X (formerly Twitter), issues regarding content moderation—particularly a user's act of deleting an unwanted comment from a page or blocking another user—have become more prevalent. A social media user whose comments were deleted or who was blocked may attempt to sue the public official who runs that social media page for violating his right to free speech. However, only "state action" can give rise to liability for a First Amendment violation. Thus, the key question in these cases is whether the official's social media use is "state action" or private action given the circumstances.

The United States Supreme Court recently released a unanimous opinion in *Lindke v. Freed, No. 22-611, (U.S. Mar. 15, 2024)* clarifying the standard governing whether an official's speech on social media is "state action." The Court held that an official's social media use is "state action" that can give rise to First Amendment liability only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when the official spoke on social media.

Lindke v. Freed concerned the Facebook page of James Freed, the city manager of Port Huron, Michigan. Freed posted both personal and business items on his page. For example, Freed would post pictures of his family, home improvement projects, and favorite bible verses while also posting about city project kick-offs, press releases, and public comment forms. When COVID-19 hit, Freed started seeing regular comments on his Facebook page from Kevin Lindke, who was unhappy with the city's approach to the pandemic. Freed deleted some of Lindke's comments and eventually blocked Lindke altogether (keeping Lindke from commenting on any of Freed's posts). Lindke then sued Freed pursuant to 42 U.S.C. § 1983 for violating Lindke's constitutional right to free speech. The Supreme Court ultimately remanded the case back to the Sixth Circuit to apply the new two-pronged test developed in its decision.

In its opinion, the Supreme Court emphasizes that this question is complicated because public officials retain their own personal constitutional rights. For example, an official retains her right to speak as a private individual about matters of public concern even if she holds a public facing position. As such, the Supreme Court resists any broad sweeping rule and instead develops a very fact-specific two-pronged test.

The first prong of the test asks whether the official possessed actual authority to speak or act on the State's behalf. The Court indicates that determining the scope of an official's power requires careful review of the relevant statute, ordinance, regulation, or customs relating to the position. The second prong of the test asks whether the official purported to exercise that authority when the official spoke on social media. This prong emphasizes that the context of the speech matters. Courts may

Continued on page 2

DOL Issues Final Overtime Rule

On April 23, 2024, the U.S. Department of Labor issued a final rule which impacts who is eligible for overtime pay. Under the Fair Labor Standards Act (FLSA), employees generally must be paid overtime at 1.5 times their regular rate of pay for hours worked over 40 in a defined workweek.

Exemptions from the Overtime Rule

There are several exemptions from the overtime rule. With regard to the most common exemptions (the executive, administrative, and professional exemptions), employees must be paid a minimum amount of money, known as the salary level, in order to be exempt from overtime. This requirement is in addition to the requirement that these employees be paid on a "salary basis" and meet certain tests based on their job duties.

Currently, employees must be paid a minimum of $684 per week ($35,568 per year) to meet the salary level for exempt status. As with past iterations of this rule, there have been legal challenges to this new rule. A court might stop the rule from taking effect for some or all employers. In 2016, a federal court stopped an increase in the salary level from taking effect. However, a 2020 increase in the salary level did take effect. Therefore, employers should track the status of the new rule, and prepare to adjust their plans depending on whether or not the final rules take effect.

Minimum Salary Level Increase

Under the new rule, effective July 1, 2024, the minimum salary level would be increased to $844 per week ($43,888 annually). Effective January 1, 2025, the minimum salary level would increase to $1,126 per week ($58,552 annually). Employers are still permitted to satisfy up to 10% of the salary level using nondiscretionary bonuses and incentive payments (including commissions) paid annually or more frequently. The new rule also does not change the "salary basis" or duties tests required for employees to qualify for exempt status.

The final rule also increases the salary level and the total annual compensation requirement for highly compensated employees (HCE) in order to qualify as exempt from overtime. On July 1, 2024, the HCE total annual compensation level must equal at least $132,964. On January 1, 2025, the HCE total annual compensation level must equal at least $151,164.

The final rule also adopts a mechanism to update the earnings thresholds every three years. Please reach out to Boardman Clark's Municipal Practice Group if you have questions.

—Jennifer S. Mirus, Brian P. Goodman, Douglas E. Witte

Court of Appeals Clarifies Scope of Arrest Record Protections

Arrest and conviction record discrimination law is a complex area for public and private employers to navigate, and it is one that can lead to liability for unwary employers. There have been several significant Wisconsin court cases that address these issues under the Wisconsin Fair Employment Act (WFEA) over the last two years, and the Wisconsin Court of Appeals just released another decision which concerns arrest record discrimination. Given these decisions, municipalities and employers must stay up to date on the state of the law to ensure they are meeting their legal obligations.

Under the WFEA, public and private employers are severely restricted in how they can use arrest record information in the hiring process. The WFEA defines "arrest record" broadly as including but not limited to: "[I]nformation indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority." (Emphasis added). The Madison General Ordinances use identical language to define "arrest record," but the case which is the subject of this article only addressed the WFEA and not the Madison General Ordinances.

In *Oconomowoc Area School District v. Gregory L. Cota, et al.*, the District terminated Jeffrey and Gregory Cota because it

Continued on page 3

Lindke v. Freed

Continued from page 1

look at whether a social media account or page appears official, whether it contains a disclaimer or description of the page as private, and whether the account is held personally or passed between those who hold a particular official position.

In light of this new standard, officials should consider taking the following steps related to their social media use:

- Maintain separate social media accounts for personal use and official business.
- Include a disclaimer on your personal social media accounts making it clear that you are speaking only for yourself and do not speak for the government entity you work for.
- Avoid posting work-related business on your personal social media accounts.
- Be careful about deleting content or blocking a user from an official social media page. Although some circumstances may justify content moderation on an official social media page (for example, if someone is making violent threats), deleting content or blocking users on an official page may open officials up to liability. It is best to consult an attorney if you are unsure of whether content moderation is appropriate in a given circumstance.

—Liz Leonard

Broader Array of Conduct Now Qualifies as Employment Discrimination

Municipal employers should take note of a decision released by the U.S. Supreme Court that will make it easier for employees to prove claims of discrimination under Title VII.

Previously, under federal law as applied in Wisconsin, the lateral transfer of an employee from one job to another that did not result in a loss of pay, benefits, or rank could not be the basis for a claim of discrimination under Title VII. However, the U.S. Supreme Court recently changed that rule in *Muldrow v. City of St. Louis,* 194 S Ct. 967 (2024) where it held that employees can now point to lateral transfers as discrimination if the transfer results in changes that cause "some harm" to the employee, and the employee can prove that the transfer was based on a protected trait, such as race, age, or gender.

The Case

This case involved Jatonya Muldrow who served as a plainclothes officer with the St. Louis Police Department in the specialized Intelligence Division and was assigned to work with the FBI on certain cases. Although Muldrow was by all accounts a well-performing employee, a new supervisor replaced her with a male employee. Muldrow was transferred to a different job with the same pay and rank. However, other aspects of her job were changed or taken away from her. For example, she was now a uniformed officer, she was assigned more mundane tasks, she no longer had access to an unmarked take-home police vehicle, and she was now required to work weekends on a rotating schedule.

Muldrow sued and alleged that these changes constituted gender discrimination because she did not like the changes even though her pay and rank remained the same. She claimed that the transfer was discriminatory based on her gender because she was replaced with a male employee. Muldrow lost her case at both the trial court and appeals court levels. However, the U.S. Supreme Court ultimately ruled in her favor.

Moving forward, to prove discrimination under Title VII, an employee must only show that a complained-of action caused "some harm" to an employee's identifiable terms and conditions of employment. The harm does not have to be significant. The *Muldrow* decision is a relatively sweeping ruling because (1) nearly anything related to the workplace could be classified as a term or condition of employment (the courts have long held that "terms and conditions" are not limited to economic or tangible matters); and (2) many actions taken by employers could be deemed to cause "some harm" to an employee. The Court held that if the complainant could prove her allegations, she "was worse off several times over" with respect to certain terms and conditions of the job. This ruling is expected to make it easier for plaintiffs to prove discrimination claims and will likely lead to an increase in claims brought by employees against their employers.

Conclusion

While this case makes it easier for employees to allege that a given action by their employer was potentially discriminatory, employees still must prove that the reason for the employer's action was the employee's protected class. Employers can still prevail on discrimination cases if they have a valid non-discriminatory reason for the change in the employee's terms and conditions of employment, such as having legitimate business reasons for a transfer.

We encourage municipalities to reach out to a member of the Boardman Clark Municipal Practice Group with questions or concerns with respect to changes to an employee's position in their workforce.

— Storm B. Larson

Arrest Record Protections

Continued from page 2

believed they improperly retained money they received from selling District scrap metal. The Cotas received municipal citations for theft and paid $500 to the municipal prosecutor to resolve the case. There is no indication that either man was ever questioned or physically apprehended by a law enforcement authority. The Cotas challenged their terminations by filing a charge with the Wisconsin Equal Rights Division and contended that their terminations constituted unlawful arrest record discrimination because of the catch-all language "other offense" in the WFEA's definition of "arrest record."

The Administrative Law Judge determined there was no discrimination. An appeal of that decision was filed with the Labor & Industry Review Commission (LIRC), which ruled in the Cotas' favor and concluded that the WFEA prohibited discrimination based on offenses which are civil or municipal. A circuit court affirmed LIRC's decision. On appeal to the Wisconsin Court of Appeals, the court reversed the lower decision and held that the WFEA's definition of "arrest record" only extended to offenses which were criminal and not civil in nature. In the end, the District prevailed, and the court ruled that the District was entitled to terminate the Cotas based on their municipal violations. Therefore, moving forward, civil offenses cannot be the basis for a claim of arrest or conviction record discrimination under the WFEA.

Although this decision limited the scope of the WFEA's protections against arrest record discrimination, employers should remain wary of doing independent research on applicants' records of criminal activity as this can lead to errors in the employment decision-making process and cause applicants and employees to be unlawfully stereotyped. Additionally, employers should still remain wary of their obligations under laws like the Fair Credit Reporting Act and local ordinances which are not affected by the outcome of this decision.

—Storm B. Larson

BoardmanClark

1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

PRST STD
US POSTAGE
PAID
MADISON WI
PERMIT NO 511

ADDRESS SERVICE REQUESTED

Certified ABA-EPA Law Office
Climate Challenge Partner

Municipal Law Newsletter

The Municipal Law Newsletter is published by Boardman & Clark LLP, Fourth Floor, One South Pinckney Street, Madison, Wisconsin 53701-0927, 608-257-9521. The Newsletter is distributed to our clients and to municipal members of our clients, the Municipal Electric Utilities of Wisconsin and the Municipal Environmental Group—Water Division.

If you have a particular topic you would like to see covered, or if you have a question on any article in this newsletter, feel free to contact any of the attorneys listed below who are contributing to this newsletter.

Please feel free to pass this Newsletter to others in your municipality or make copies for internal use. If you would like to be added to or removed from our mailing list, or to report an incorrect address or address change, please contact Charlene Beals at 608-283-1723 or by e-mail at cbeals@boardmanclark.com.

Eileen A. Brownlee	608-822-3251	ebrownlee@boardmanclark.com
Maximillian J. Buckner	608-283-1787	mbuckner@boardmanclark.com
Anita T. Gallucci	608-283-1770	agallucci@boardmanclark.com
Brian P. Goodman	608-283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	608-286-7255	ehagen@boardmanclark.com
Joseph J. Hasler	608-283-1726	jhasler@boardmanclark.com
Richard A. Heinemann	608-283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	608-286-7210	pjohnson@boardmanclark.com
Lawrie J. Kobza	608-283-1788	lkobza@boardmanclark.com
Storm B. Larson	608-286-7207	slarson@boardmanclark.com
Liz Leonard	608-283-7224	lleonard@boardmanclark.com
Julia K. Potter	608-283-1720	jpotter@boardmanclark.com
Jared W. Smith	608-286-7171	jsmith@boardmanclark.com
Steven C. Zach	608-283-1736	szach@boardmanclark.com