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PERSPECTIVE

When employees speak for the state

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Online platforms have made sharing one's opinions on the Internet a commonplace practice among private citizens, including those employed by the government. Thanks to the recent 9th U.S. Circuit Court of Appeals decision in *Naffe v. Frey*, 2015 DJDAR 6554 (June 15, 2015), state employees who blog or tweet for personal reasons on their own time while disclaiming their official capacities can be more confident that their online commentary will not subject their state employer to liability under 42 U.S.C. Section 1983 — the statutory vehicle by which a plaintiff can bring federal constitutional and statutory challenges to actions by state and local officials.

In *Naffe*, the 9th Circuit considered if and when a state employee who moonlights as a blogger “acts under color of state law” enough to give rise to liability under Section 1983. Plaintiff Nadia Naffe sued criminal prosecutor John Patrick Frey and his employer, Los Angeles County, for statements Frey allegedly published on his personal website and Twitter. Frey used his blog and Twitter to comment on various issues. Though Frey frequently referenced his position as a deputy district attorney, his blog contains the disclaimer, “The statements made on this web site reflect the personal opinions of the author. They are not made in any official capacity, and do not represent the opinions of the author's employer.” Frey's Twitter page displays a similar disclaimer.

At issue in *Naffe's* lawsuit were certain unfavorable articles and tweets about Naffe. These publications concerned Naffe's admission that she had assisted her former colleague, conservative politico James O'Keefe, in a 2010 “sting operation” plot to wiretap Rep. Maxine Waters' office in Los Angeles. Frey's postings also concerned Naffe's admission to having accessed O'Keefe's email account in 2010, after O'Keefe checked his email on Naffe's smartphone without logging out of the application. Frey's tweets included threatening and harassing statements that included an insinuation that Naffe broke the law by accessing the emails.

Naffe sued Frey, the county, and several others, alleging, among other claims, a violation of Section 1983. The district court, however, held that Frey did not act “under color of state law” when he blogged and tweeted about Naffe, and dismissed the claims.

On appeal, Naffe argued Frey had threatened to prosecute her and alleged that Frey's goal was to intimidate her into silence about O'Keefe's illegal activities, as Frey was O'Keefe's friend. In this way, argued Naffe, Frey was acting under color of state law. The 9th Circuit disagreed, and noted that an act under color of state law is demonstrated “when [an individual] abuses the position given to him by the state,” a test that is “generally satisfied when a state employee, like a deputy district attorney, wrongs someone while acting in his official capacity or while exercising his responsibilities pursuant to state law.” Furthermore, the court noted, particularly when the state employee is off duty, whether he is “acting under color of state law” turns on the nature and circumstances of the conduct and its relationship to the performance of official duties.

The *Naffe* court looked to several 9th Circuit decisions in similar cases. In *Van Ort v. Estate of Stanewich*, 92 F.3d 831 (1996), the court held that a San Diego sheriff's deputy did not act under color of state law when he attempted to rob the plaintiffs — even though he had originally identified his victims during a police search of their home — because, at the time of the attempted robbery, he was not in uniform, did not display a badge, and denied being a police officer. Under those facts, the 9th Circuit concluded that “[a]t no point did [defendant] purport to be acting as a policeman,” and that the victims' recognition of defendant as an officer “does not alone transform private acts into acts under color of state law.”

The 9th Circuit reached the opposite conclusion in *McDade v. West*, 223 F.3d 1135 (2000), and *Anderson v. Warner*, 451 F.3d 1063 (2006). In *McDade*, an employee of the Ventura County district attorney's office used her official position to access a Medical Eligibility Data computer system maintained by her

employer to locate her husband's ex-wife. This was found to be an act under color of state law because she abused her responsibilities and purported or pretended to be a state officer during the hours in which she accessed the computer. In *Anderson*, a jail commander in Mendocino County assaulted the plaintiff after the plaintiff rear-ended him. Though off duty, the jail commander prevented bystanders from intervening in his attack by claiming that he was “a cop,” a statement repeated by the bystanders. The 9th Circuit found there was a close nexus between the jail commander's work at the jail and his claim that the assault was “police business.”

Based on the framework from these cases, the *Naffe* court held that an off-duty state employee acts under color of state law when (1) the employee purports to or pretends to act under color of law; (2) his pretense of acting in the performance of his duties had the purpose and effect of influencing the behavior of others; and (3) the harm inflicted on the plaintiff related in some meaningful way either to the officer's governmental status or to the performance of his duties. The court pointed out, however, that “a government employee does not act under color of state law when he pursues private goals via private actions.”

The *Naffe* court said Frey did not purport or pretend to act under the color of law for several reasons. For example, Frey's official duties did not include publicly commenting on politics, he used a disclaimer to the contrary, and the time stamps on his posts were often late at night — i.e., not during normal work hours. Likewise, the court found Frey's comments were not related to work. There were no allegations that Frey actually investigated Naffe for illegal conduct, and “a single Tweet in which Frey rhetorically asked ‘what criminal statutes, if any, [Naffe] admitted violating,’ does not create a nexus between Frey's private harangues and his job.” Furthermore, that Frey drew upon his experiences as a deputy district attorney does not transform private speech into public action. Indeed, the court noted, “if we were to consider every comment by a state employee to

be state action, the constitutional rights of public officers to speak their minds as private citizens would be substantially chilled to the detriment of the ‘marketplace of ideas.’” Moreover, that Naffe knew Frey was a prosecutor did not mean he abused his position to violate her rights. The focus of the courts inquiry was not on what Naffe knew about Frey, but rather on how he used his position as a state employee to harm Naffe.

Naffe helps delineate the parameters of when and how a state employee can safely blog or tweet on her own time. Some best practices will include:

- Confine commentary to privately owned platforms;
- Never use your employer's resources to publish personal opinions;
- Ensure all postings include a written notification indicating that the views expressed are your views only, and are not endorsed by your employer;
- Only publish content before or after work hours;
- Do not invoke your official government position or title, either by dress or in words, in connection with your personal endeavors; and
- If your job description includes public commentary on certain issues, avoid private commentary on those issues.

With these guidelines in mind, state employees should be able to exercise their constitutional right to speak their minds as private citizens, without fear of Section 1983 liability.

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