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Lawmaker Bullies Employer Because Its Employee Supported Gay Marriage

by Hans Bader on September 10, 2012 · 0 comments

in Employment, Legal, Personal Liberty

Maryland State Delegate Emmett Burns (D-Baltimore), who has a long record of hostility to business (a 90 percent bad MBRG rating), gave more evidence of that last week with a bullying letter to a sports team, the Baltimore Ravens, telling it to gag a player who supports gay marriage. His letter to the owner of the team (which did not even spell the player's name right) showed flagrant contempt for the First Amendment. The letter, on official Maryland House of Delegates stationery, begins with "As a Delegate to the Maryland General Assembly and a Baltimore Ravens Football fan," and ends with this:

I am requesting that you take the necessary action, as a National Football Franchise Owner, to inhibit such expressions from your employee and that he be ordered to cease and desist such injurious actions. I know of no other NFL player who has done what Mr. Ayambadejo is doing.

Please give me your immediate response.

Player Brendon Ayanbadejo's supposedly "injurious actions" are constitutionally-protected speech, pure and simple: "publicly endors[ing] Same-Sex marriage," which Del. Burns faults for "dividing the fan base." As law professor Eugene Volokh notes, "This seems to be a pretty inappropriate thing for a legislator, speaking in a way that stresses his role as legislator, to say to a private employer. There is no express threat of retaliation here, but such letters to private businesspeople — who often have to deal with legislature on various regulatory issues — tend to carry something of an implied threat, especially when they stress the author's legislative position." [UPDATE: Delegate Burns now appears to be backing off in the face of public backlash.]

The Fourth Circuit Court of Appeals, which has jurisdiction over Delegate Burns and the Baltimore Ravens, has ruled that if a government official pressures a private employer to take action against someone (such as firing an employee) for his speech, that violates the First Amendment, *see Korb v. Lehman*, 919 F.2d 243 (4th Cir. 1990) (pressure on defense contractor to fire employee for speech). Two other appeals courts have reached

similar conclusions. *Dossett v. First State Bank*, 399 F.3d 940 (8th Cir. 2005); *Reuber v. U.S.*, 750 F.2d 1039 (D.C. Cir. 1985).

Government officials wish otherwise, and want to be able to pressure private employers to suppress speech by their employees. For example, the federal Equal Employment Opportunity Commission (EEOC), which seeks to use discrimination and sexual harassment laws to suppress speech (by defining a broad range of speech as a "hostile work environment," and declaring the existence of a "hostile environment" based on trivially offensive speech or non-sexist sexual humor that logically should not be viewed as discrimination), successfully persuaded a Florida trial judge that otherwise protected speech in the workplace can be restricted because private employers can voluntarily restrict speech of their employees, so such employees must have no free speech rights at all (the EEOC obtained an injunction requiring the employer to discipline employees for any sexually-suggestive speech or reading materials that might hypothetically contribute to a "hostile work environment"). *See Robinson v. Jacksonville Shipyards*, 760 F.Supp. 1486 (M.D. Fla. 1991).

The government's theory was wrong, because although the First Amendment does not apply to private employers (who are not the government and thus are not bound by the First Amendment), it does apply to the government, which cannot use a private employer as its puppet to restrict speech. The Florida's judge's erroneous rationale is at odds with the Fourth Circuit's *Korb* decision, which made clear that the government can't force a private employer to silence an employee merely because the private employer could do so of its own volition. (The Fourth Circuit's ruling, unlike the Florida ruling, did not involve allegations of sexual harassment or discrimination.)

Earlier, I wrote about how government officials like the Speaker of the New York City Council and a Chicago Alderman violated the First Amendment by retaliating against Chick-fil-A over speech by its CEO opposing gay marriage — such as the New York Council Speaker's pressure on New York University to eliminate a Chick-fil-A franchise on its campus. When government officials pressure a private institution to terminate a contract with another private entity due to that entity's speech, that violates the First Amendment.

For example, the federal appeals court in New York ruled that a city official's letter urging a billboard company to stop displaying a church's anti-homosexuality billboard potentially violated the First Amendment, since the letter cited his "official authority as 'Borough President of Staten Island' and thus could constitute an "implicit" threat, even though the official lacked direct regulatory authority over the billboard company and did not explicitly threaten any reprisals. *See Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003); *see also Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991) (reviving free speech lawsuit by businessman over village official's letter to Chamber of Commerce criticizing it for publishing the businessman's ad critical of village policies in the Chamber's publication).

Government retaliation for speech does not necessarily need to include explicit threats or pressure to violate the First Amendment. For example, if the government merely reprimands a public employee for his speech, or censures a private citizen for his speech, some courts find that to be a violation of the First Amendment. *See Columbus Education*

Association v. Columbus Board of Education, 623 F.2d 1155 (6th Cir. 1980) (government employee reprimand violated First Amendment); *Little v. N. Miami*, 805 F.2d 962 (11th Cir. 1986) (censure resolution by city council might violate First Amendment); *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (baseless investigation over speech violated First Amendment).