

## Civil Rights Update

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### Seventh Circuit Addresses Public Employee Speech

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In *Lalowski v. City of Des Plaines*, 789 F.3d 784 (7th Cir. 2015), the Court of Appeals for the Seventh Circuit held that a police officer who verbally harassed and insulted an abortion protester did not speak on a matter of public concern despite the fact that the comments were made at a public demonstration. While unpublished, this decision has many important implications for civil rights attorneys who defend governmental entities in free speech claims.

#### Factual Background

Dick Lalowski was a police officer for the City of Des Plaines, Illinois. *Lalowski*, 789 F.3d at 787. On the morning of May 20, 2006, he had two verbal disputes with a group of demonstrators at an abortion clinic. One of the disputes occurred while he was on duty, and the other dispute occurred shortly after his shift ended. *Id.* The demonstrators hoped to dissuade women from entering the clinic and displayed large signs containing images of aborted fetuses. *Id.* Officer Lalowski warned the demonstrators not to obstruct traffic or stop anyone from entering the clinic. *Id.* He also threatened to arrest anyone who did not comply. *Id.* At that point, the lead demonstrator, Paula Emmerth, claimed that Lalowski called her a “fat...cow,” along with other profanities and threats, and accused the group of acting like the Taliban. *Id.* Emmerth also claimed that Lalowski generally behaved in a way that was intimidating and “out of control.” Officer Lalowski conceded that this initial confrontation with the demonstrators was adversarial but denied using any profanity or comparing the demonstrators to the Taliban. *Id.* at 787-88.

After his shift, Lalowski changed into plain clothes and decided to go back to the clinic to confront the demonstrators about the signs. *Id.* at 788. Lalowski approached Emmerth, asked her if she remembered him, and told her that he was now off duty. *Id.* Lalowski asked Emmerth why the demonstrators were displaying the aborted-fetus signs, and Emmerth responded that they were using the signs to expose the truth about abortion. *Id.* Lalowski told Emmerth and the other demonstrators that they should not show the fetus signs because a woman who had recently had a miscarriage might drive by and be upset with the signs. *Id.* Emmerth refused to take down the signs and Lalowski responded by calling her a “fat...cow” and a “sinner of gluttony.” *Id.* He also lectured Emmerth on the importance of exercise and demonstrated aerobic exercises she could do to lose weight. *Id.* A factual dispute existed as to the extent of physical contact made by Lalowski with Emmerth. Lalowski claimed that he patted Emmerth on the shoulder, but Emmerth claimed that he poked and rubbed her arms in a sexual way. *Id.*

Lalowski remained at the clinic for approximately an hour and twenty minutes and spoke with many demonstrators. *Id.* It was undisputed that Lalowski accused the demonstrators of using intimidation tactics like the Taliban, compared their use of the aborted-fetus signs to using an image of a priest bending over a small boy to protest sexual abuse within the Catholic Church, called demonstrator Wanda Glitz a “psycho” and a “man hater,” called Paula Emmerth a “fat cow” multiple times, and called Paula Emmerth’s sister, Teresa, “fatty.” *Id.*

Lalowski was eventually informed by another officer that a demonstrator had called the police department to request police assistance at the clinic. *Id.* at 789. Realizing his efforts to persuade the demonstrators were ineffective, Lalowski gave Emmerth a hug and told her that he loved her, and left the clinic. *Id.*

When the police chief heard about the incident, he requested an investigation into Lalowski's conduct. *Id.* The investigation report confirmed that Officer Lalowski's conduct caused a disturbance among numerous citizens, which resulted in a hostile feeling towards the City of Des Plaines and the police department. *Id.* The police chief suspended Lalowski without pay and filed five charges with the Board of Commissioners (Board). *Id.* In reaching its decision to sustain all charges to terminate his employment, the Board relied upon Lalowski's disciplinary history, which included five suspensions and two written reprimands. *Id.* One of the disciplinary actions involved a suspension which resulted from an argument he had with a woman where he called her a "slut" and a "whore" and pushed her to the ground. *Id.* Lalowski also previously received a written reprimand for using profane language toward a private citizen. *Id.*

Lalowski filed claims against the police chief, the Board and the City of Des Plaines pursuant to 42 U.S.C. § 1983, alleging that they retaliated against him for his protected speech in violation of the First Amendment.<sup>2</sup> *Id.* at 787. The parties filed cross-motions for summary judgment. The district court granted summary judgment against Lalowski, and Lalowski appealed. *Id.*

### Seventh Circuit's Ruling

When a plaintiff brings a Section 1983 claim for retaliation in violation of First Amendment rights in an employment context, the court's analysis involves three steps: (1) determine whether the employee's speech was constitutionally protected under the *Connick-Pickering* test; (2) determine whether the plaintiff established that the speech was a substantial or motivating factor in the alleged retaliatory action; and (3) if the plaintiff satisfies the first two steps, then the defendant has an opportunity to establish that the same action would have been taken in the absence of the employee's protected speech. *Lalowski*, 789 F.3d at 790, citing *Hutchins v. Clarke*, 661 F.3d 947, 955 (7th Cir. 2011).

The district court found that some of Lalowski's statements did not address a matter of public concern and were therefore unprotected. *Lalowski*, 789 F.3d at 790. The court also determined that some of Lalowski's statements touched only loosely upon matters of public concern, and because the state had a "strong overriding interest" in proscribing them, those statements were also unprotected. *Id.* at 791. Finally, the district court found that some of Lalowski's statements that had touched more directly upon matters of public concern were protected because the state lacked a "legitimate overriding interest" in proscribing them. *Id.*

The Seventh Circuit agreed with the district court that some of Lalowski's speech addressed matters of public concern because he expressed disapproval of the protester's aborted-fetus signs. *Id.* However, the Seventh Circuit disagreed with the district court's conclusion that the state had no "legitimate overriding interest" to exclude them. *Id.*

The Seventh Circuit first analyzed Lalowski's statements utilizing the *Connick-Pickering* test to determine whether Lalowski's speech was constitutionally protected. *Lalowski*, 789 F.3d at 790; see *Connick v. Myers*, 461 U.S. 138 (1983); see also *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). The *Connick-Pickering* balancing test is applied to determine whether "the interest of the [plaintiff] as a citizen in commenting upon the matters of public concern" are outweighed by "the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Lalowski*, 789 F.3d at 791, citing *Coady v. Steil*, 187 F.3d 727, 731 (7th Cir. 1999).

The court applied the *Connick-Pickering* balancing test using several interrelated factors including: “(1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee’s ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.” *Lalowski*, 789 F.3d at 791 (citing *Gustasson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002)).

In applying each of the factors to *Lalowski*’s case, the court agreed that the majority of the factors weighed heavily against *Lalowski*. *Lalowski*, 789 F.3d at 791. His speech had the potential to create problems in maintaining discipline and harmony within the police department. *Id.* In fact, police officers were stationed at the clinic to keep the peace during the protests and *Lalowski* positioned himself in opposition to the goals of his employer. *Id.* The potential for disruption was exacerbated by the second factor, the importance of personal loyalty and confidence in the employment relationship, which the court noted is especially important in law enforcement. *Id.* at 792. *Lalowski*’s speech also directly conflicted with the third factor because he had a duty as a police officer to foster a relationship of trust and respect with the public. *Id.* *Lalowski*’s conduct was below the standard of conduct that the public expects from police officer, as outlined in the fourth factor. *Id.* The fifth factor was supported by *Lalowski*’s disciplinary history, and the court determined that the police chief and Board had a substantial interest in preventing further hostile interactions with the public. *Id.*

The court determined that the sixth factor, which required an analysis as to whether the matter was one on which the debate was essential to informed decision-making, was the only factor that weighed in favor of *Lalowski*’s speech interest because the organized protest could benefit from informed debate regarding its methods. *Id.* In analyzing the final factor, the court concluded that *Lalowski* was not off duty when he engaged in the speech, so he cannot be regarded as a member of the general public. *Id.* The court reasoned that he first confronted the demonstrators while on duty and then left the clinic only to return off duty. *Id.* at 792-93. Although his shift ended, the court concluded that his second encounter was a mere continuation and escalation of the earlier confrontation. *Id.* *Lalowski* even made sure the demonstrators remembered him as a police officer. *Id.* Because *Lalowski* represented himself as an off-duty police officer rather than a mere private citizen, the court held that that *Lalowski* was not speaking as a member of the general public. *Id.*

The court noted that six of the seven *Pickering* factors favored the state’s interests and held that the state’s interests in operating an efficient and effective police department outweighed *Lalowski*’s speech interests. *Id.* at 793. Thus, the court ultimately concluded that none of *Lalowski*’s statements to the demonstrators were constitutionally protected and affirmed the district court’s entry of summary judgment in favor of the City of Des Plaines. *Id.*

## Conclusion

Governmental entities should proceed with extreme caution when attempting to limit a public employee’s speech. Reasonable minds can differ as to whether the speech addresses a matter of public concern. Lawyers practicing in the Seventh Circuit should be mindful that the court will use seven interrelated factors which were outlined in the *Lalowski* opinion to determine whether the interests of the public employee are outweighed by the employer’s interest in promoting the efficiency of public services. The Seventh Circuit’s opinion demonstrates that the court will limit a public employee’s speech, particularly if it interferes with the state’s interest in operating an efficient and effective police department.



<sup>1</sup> At trial, Lalowski claimed that he made these statements to provide Emmerth with a few stinging examples of “how the truth can hurt.”

<sup>2</sup> Lalowski also filed a claim against the Board under the Illinois’s Administrative Review Law, 735 ILCS §§ 5/2-101 et seq., seeking review of the Board’s decision to terminate his employment.

### About the Authors

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