Bloggers Sued for Creating 'Hostile Environment' in Apartment Buildings

A recent ruling by the Third Circuit Court of Appeals menaces free speech in condominiums, apartment buildings, and the Internet. It allowed individual bloggers to be sued because their blog posts allegedly created a "hostile housing environment" for condo residents who kept emotional-support dogs despite the condominium's no-dogs rule. This "hostile environment" allegedly rendered those blog posts "harassment" in violation of the Fair Housing Act. The provision the court cited does not even mention a hostile environment, but rather makes it illegal "to coerce, intimidate, threaten, or interfere" with the exercise or enjoyment of rights under the Fair Housing Act. (See 42 USC 3617).

Alarmingly, the court's ruling in *Revock v. Cowpet Bay West Condominium Association* also suggested that a single sufficiently offensive blog post could potentially constitute illegal "harassment." It stated in dictum that "a single act may be sufficient, provided that the conduct is 'sufficiently severe or pervasive.'" This was a gratuitous statement, since each of the bloggers it allowed to be sued posted multiple blog posts critical of the allegedly disabled plaintiffs.

The court justified this extremely expansive reading of the statute by citing a speech-restrictive regulation imposed by the Obama administration that purports to interpret the statute. After defining illegal interference to include the creation of a "hostile environment," that regulation states that "[h]arassment can be written, verbal, or other conduct, and does not require physical contact." 24 C.F.R. § 100.600(b) (2016). In addition, "[a] single incident of harassment because of race, color, religion, sex, familial status,

national origin, or handicap may constitute a discriminatory housing practice, where the incident is sufficiently severe to create a hostile environment, or evidences a quid pro quo." 24 C.F.R. § 100.600(c) (2016).

Courts are not supposed to defer to agencies at the expense of free speech. Had the bloggers raised a First Amendment defense, deferring to the Obama administration's speech-restrictive interpretation of the statute would be an error. Even when an agency would otherwise receive great deference in interpreting a statute, it will not receive any deference from the courts where its interpretation would raise potential free-speech problems. The Supreme Court has made this point in the past. (*See Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 574-575 (1988) (construing National Labor Relations Act narrowly to avoid potential free-speech problems, despite the broad *Chevron* deference that the NLRB's interpretation usually receives).

But here, no First Amendment defense seems to have been raised, so it is not clear how free speech principles should have shaped the court's interpretation of the statute. Presumably, as federal appeals court Judge Alex Kozinski once noted, courts should reinterpret the statute more narrowly in the future when a First Amendment defense is later raised. *See United States v. X–Citement Video*, *Inc.*, 982 F.2d 1285, 1296 n.7 (9th Cir. 1992) (*Kozinski,* J., dissenting), *rev'd*, 513 U.S. 64 (1994) (arguing that if a harassment law is interpreted too broadly in the absence of a First Amendment defense, it should later be reconstrued more narrowly by the same court when a First Amendment defense is raised).

The Third Circuit may have wrongly assumed that since speech in the workplace that creates a racially or sexually hostile environment is illegal under Title VII of the Civil Rights Act, speech can likewise be restricted outside the workplace

as well. But as the Ninth Circuit Court of Appeals noted in ruling that federal civil rights officials violated the First Amendment by investigating non-violent speech that allegedly impeded a housing project for the disabled, the Supreme Court has allowed restrictions on workplace speech "to an extent that would rarely, if ever, be tolerated in other contexts" such as the housing context. *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), *citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). Similarly, the Third Circuit itself has noted that there is no "harassment exception" to the First Amendment, in striking down schools' hostile-environment harassment codes as restricting too much speech. *Saxe v. State College Area School District*, 240 F.3d 200, 204, 210 (3d Cir. 2001); *DeJohn v. Temple University*, 537 F.3d 301, 316 (3d Cir. 2008).

The Cato Institute's Walter Olson also raised First Amendment concerns in a blog post describing the Third Circuit's ruling:

> *In blog posts and comments, two residents of a Virgin Islands condominium complex criticized two other residents who were (in line with rights prescribed to them under federal law) keeping emotional-support dogs despite a no-dog rule in the complex. Among other statements, one or the other of the two said dog owners would be "happier in another community," speculated that "diploma mill" paperwork could certify any canine whose owner cared to claim stress, suggested the complex should "lawyer up" and be prepared to go to court to defend its rule against "known violators," and proposed the dog owners be "ostracized" by other residents.*
>
> *The dog-owning residents sued the neighbors, along with the condo association and other defendants. They cited federal legal interpretations, which have since been buttressed by a regulation issued in the Obama administration, that hold it "hostile environment harassment" under the Fair Housing Act to make statements that "interfere" with another's exercise of rights under the law.*

> *Now the Third Circuit, as part of a decision resolving numerous issues about the case, reversed grants of summary judgment in favor of the two blog writers and ruled that they could properly be sued for damages for creating a hostile environment under the Fair Housing Act. It described as "harassment" various instances of their critical speech and noted that a single instance of harassing speech could give rise to liability under the law. It is not clear whether the parties raised, and the court did not make any gesture toward considering, whether some or all of the statements involved might be protected by the First Amendment, which is mentioned nowhere in the opinion. [Revock v. Cowpet Bay West Condominium Association et al., see relevant section VI, pp. 31-41 of opinion via John Ross, Short Circuit]*

The Supreme Court has made clear that (at least outside the workplace) the First Amendment limits damage claims by alleged victims suing over harassing or hateful speech, *see Snyder v. Phelps*, 131 S.Ct. 1207 (2011). Courts outside the Third Circuit have likewise made clear that the First Amendment forbids liability under the Fair Housing Act for non-violent speech even if it has a negative impact on housing for the disabled. *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000). The First Amendment has been held to limit not only government investigations and lawsuits, but Fair Housing Act lawsuits by private plaintiffs against speakers. *See Affordable Housing Development Corp. v. City of Fresno*, 433 F.3d 1182 (9th Cir. 2006). Moreover, even when speech is arguably unprotected by the First Amendment, First Amendment principles logically require more stringent appellate review of any damage award based on the speech. *See, e.g.,* Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases,* 90 Nw. U. L. Rev. 1009 (1996).

As Eric Goldman notes, the Third Circuit's ruling in the *Revock* case creates serious First Amendment problems:

> *The words "free speech" and "First Amendment" do not appear in the opinion once…Yet, Talkington and Felice were discussing issues of significant interest to their local community (the "no dogs" policy) as well broader social issues (dogs as "emotional support animals"). They were also discussing if and how the condo association should enforce against a facial violation of the condo rules. Whether or not Talkington and Felice had exclusionary intent, the First Amendment creates some space for them to publicly vet these important issues.*

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