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## **Does Ordering an Employee to Refrain From Certain Personal Contacts Violate Constitutional Due Process?**

### **The Federal Constitution May be Violated by “No Contact Orders”**

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When a public employer conducts an internal investigation into suspected misconduct, it is quite common to order the subjects of the investigation to refrain from contacting each other during the investigation. This occurs in all types of misconduct investigations, but particularly in investigations of sexual assaults, sexual harassment, domestic violence, and other interpersonal misconduct that is likely to revolve around the kind of “he said/she said” disputes that leave relative credibility as the only test that can be applied to the evidence.

These orders are routinely given to avoid tainting the evidence with coached or contrived statements and to avoid undue influence or intimidation. They also preserve the spontaneity of the observations of the witnesses and parties. Compliance with no-contact orders avoids tipping off subjects as to the direction the investigation is moving, and conveying other important background information that would compromise the effectiveness and integrity of the investigation. In short,

there are many good reasons why a public employer would want to make such an order, and most public employers are aware of these reasons.

Another growing phenomenon within the law enforcement profession is for police employees to marry and date each other, so that a growing number of employees have a spouse, co-habiting partner or dating partner in the same department. Given the increasing number of employees living in or having intimate relations with co-employees, and the frequency with which no-contact orders are given in internal investigations, there should be no surprise that we are confronting a difficult new legal issue, as to when an employer's order to not contact a spouse or cohabiting or dating partner during the pendency of an internal investigation may violate an employee's constitutional rights. And, because so many internal investigations are combined with criminal investigations, when this issue arises in an internal investigation, it may often intersect with the same issue as it pertains to the rights of a criminal defendant.

Accordingly, it is helpful for both employers and employees to have a basic understanding of the constitutional tests that determine the extent to which an employee can properly be ordered to refrain from contact with a spouse, a domestic partner, dating partner, or other family member. In this study, we shall survey the problem from the various dimensions in which an employer can seek to restrict the employee's right of intimate association.

For a few examples of restrictions that impact on a person's freedom to engage in social or familial relationships, an employer can issue a permanent requirement to not associate with a particular person or persons. This might be based on the person's status as a convict, or felon; or it might be based on the person having a professional status that could be seen as a conflict of interest, such as a law enforcement officer becoming intimate with a prosecutor, judge, co-employee, or supervisor. Or, an employer may seek to enforce the same restrictions not by affirmative direction, but by attaching disadvantages to such associations, such as refusing to hire or promote someone because of a relationship with a felon or undesirable person, or a co-employee. Another alternative is a temporary order to refrain from all contact with persons involved in an internal investigation, notwithstanding their intimate relationship to the person subject to the order. Another less burdensome alternative is an order to not discuss the investigation, or another type of order that restricts but does not prohibit the personal contact in question.

Our study shows that orders of this kind are subject to a relatively high degree of constitutional scrutiny under the Fourteenth Amendment due process clause, as an aspect of substantive due process. Factors that justify this type of order may include the seriousness of the misconduct under investigation, and the department's ability to demonstrate an interest in controlling the flow of information during the investigation in the particular case. Finally, an order of this kind is most likely to survive constitutional scrutiny if it is narrowly tailored to the demonstrated need at hand.

At the end of this article, we shall also explore a related issue concerning the extent to which a public employer can require disclosure of intimate personal matters in a hiring or investigative process. A significant degree of constitutional scrutiny is also applied to this type of invasion of privacy, as it is generally recognized that inquiry into intimate associational matters requires a demonstrated nexus with job performance or other important public interests.

## **1. Substantive due process encompasses a right to form and maintain intimate personal relationships.**

The substantive aspect of the Fourteenth Amendment Due Process clause protects individual rights of privacy and intimate association as a fundamental aspect of human liberty. This was established by the United States Supreme Court in Roberts v. United States Jaycees (1984) 468 U.S. 609, 617-18. The concept that the Fourteenth Amendment is the source of this right of intimate association was recognized by the Ninth Circuit Court of Appeals in IDK, Inc. v. County of Clark (1988) 836 F. 2d 1185, 1191-92. Quoting from Roberts (468 U.S. at 618-19), the Court in IDK observed that the Fourteenth Amendment protects relationships “‘that attend the creation and sustenance of a family’ and similarly ‘highly personal relationships.’” IDK, 836 F. 2d at 1193. The factors pertinent to the existence of this right in a particular situation include “‘the group’s size, its congeniality, its duration, the purposes for which it was formed, and the selectivity in choosing participants.” Id. at 1193.

Shortly before Roberts, several federal cases found cohabiting and dating relationships protected by an individual’s right of freedom of intimate association. In Briggs v. North Muskegon Police Dept. (W.D. Mich. 1983) 563 F.Supp. 585, the court held an employer liable for damages for terminating the employment of a police officer for cohabiting with a woman who was married to another man. The court opined that “‘the privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of the defendants’ acts on more than a minimal rationality basis.” Id. at 590.

## **2. Nexus with the employment is an important factor in determining the constitutionality of an order that burdens intimate relationships.**

The critical issue in Briggs was framed in terms of “whether the likely adverse effect of plaintiff’s off-duty conduct on his job performance justified his suspension and dismissal.” Id. The court decided that “‘there are many areas of a police officer’s private life and sexual behavior which are simply beyond the scope of any reasonable investigation by the Department because of the tenuous relationship between such activity and the officer’s performance on the job. In the absence of a showing that policeman’s private, off-duty personal activities have an impact upon his on-the-job performance, we believe that inquiry into those activities violates the constitutionally protected right of privacy.” Id. at 591 (quoting from Shuman v. City of Philadelphia (E.D.Pa. 1979) 470 F.Supp. 449 at 459, which reversed the termination of a police officer who refused to answer an internal investigator’s questions about his adulterous relationship).

Similarly, in Wilson v. Taylor (11th Cir. 1984) 733 F.2d 1539, a federal appellate court affirmed a damages award in favor of a police officer who was terminated because of a dating relationship with the daughter of a reputed mobster. The court held, “A state violates the fourteenth amendment when it seeks to interfere with the social relationship of two or more people. We conclude that dating is a type of association which must be protected by the first amendment’s freedom of association. Wilson’s right to date Susan Blackburn falls under his right of freedom of association. We further conclude that Wilson was fired for a reason infringing upon his constitutionally-protected freedom of association.” Id. at 1544.

After *Roberts*, the analysis in *Wilson* would properly fall under the Fourteenth Amendment, rather than the First. Essentially, the Supreme Court in *Roberts* channeled intimate association through Substantive Due Process, while the First Amendment's associational right was confined to relationships having expression as their specific purpose. See *IDK*, 836 F.2d at 1192. *Wilson* holds that a dating relationship is protected by the freedom of intimate association, which cannot be unduly burdened by punishing an employee for his choice of intimate relationships. But it is no longer good law to the extent it pins this right on the First Amendment.

An employer cannot lawfully impose a work rule or regulation that unduly burdens the right of intimate association. As stated above, this principle is directly supported by *Shuman v. City of Philadelphia* (E.D.Pa. 1979) 470 F.Supp. 449 at 459. For another example of the implication of employee privacy rights on employer conduct, the court in *Briggs* recognized that "When the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." 563 F.Supp. at 588-89. Similarly, the court in *IDK* stated that a dating relationship may receive constitutional protection because of its value as an intimate and expressive association, and upheld the regulation at hand in that case only because it did not "reach a substantial amount of constitutionally protected conduct." 836 F.2d at 1196.

### **3. The constitutional balancing test may invalidate regulation of intimate association if less restrictive means are available to achieve the legitimate governmental objective.**

The Supreme Court in *Roberts* recognized a balancing test under which the government seeking to uphold any infringement of the right of expressive association must show that its legitimate interest in the matter "cannot be achieved through means significantly less restrictive of associational freedoms." 468 U.S. at 623. At least one federal court after *Roberts* has held that an intrusion into an intimate relationship must be tested for whether it is the least restrictive means for achieving the employer's goal. In *Adkins v. Board of Education* (6th Cir. 1993) 983 F.2d 952, the court found that the termination of a school secretary because of her marriage to the school principal implicated both the freedom of intimate relationship and expressive association, and that "The right of association is violated if the action constitutes an 'undue intrusion' by the state into the marriage relationship." *Id.* at 956.

For example, where a no-contact order is given, a court may find that a simple order to not talk about the investigation would have been sufficient to serve the governmental purpose of assuring the integrity of the investigational process. In a case where a terminated deputy sheriff challenged regulations of personal associations for vagueness, the California Court of Appeal in *Arellanes v. Civil Service Commission* (1995) 41 Cal. App. 4th 1208 upheld the regulation because "Police officers ... will normally be able to determine what kind of conduct [will be detrimental to the image of the Department]." *Id.* at 1217. Likewise, officers who are ordered to not discuss an investigation are normally able to determine what matters they must refrain from discussing. If such an order appears sufficient for the investigator's purpose, an order to not have any contact at all is far too broad to serve the governmental purpose without infringing on the constitutionally protected right of intimate association of both members of the couple.

The overbreadth of such an order is also illustrated by California cases applying the state constitutional right of privacy. In Ortiz v. Los Angeles Police Relief Assn. (2002) 98 Cal. App. 4th 1288, 1300, an employee of a nonprofit association managing certain police benefit funds, terminated for marrying an incarcerated felon, brought a civil action for invasion of privacy. The court noted that the elements for such a claim consist of: “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.” The court recognized that the California constitutional right of privacy includes “an interest in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference....” Id. at 1301. The court characterized privacy as “a fundamental and compelling interest” and as “an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments to the U.S. Constitution.” Id., quoting from Robbins v. Superior Court (1985) 38 Cal. 3d 199). The Ortiz opinion recognizes that “The state Constitution ensures the freedom of association” and “protects two types of association—intimate and expressive association.” 98 Cal. App. 4th at 1302.

Examining the claim that the employer violated the right of privacy by requiring plaintiff to choose between her marriage and her job, the court stated, “Ortiz’s right to marry should be balanced against [the employer’s] countervailing interests.” Id. at 1306. Toward this end, privacy interests must be “carefully compared with competing or countervailing privacy and nonprivacy interests in a ‘balancing test.’” Id. at 1307-08. The court favored the employer’s interests in the case before it because the employment was private, and the employer had a legitimate need to protect confidential peace officer personnel information. Id. at 1313. But even though the employer prevailed in that case, the Ortiz case furnishes guidance on the stature of privacy rights under California law as it applies to the present case.

To overcome the privacy interest invaded by an order that a domestic couple not speak to each other, a department would need to show why the lesser order, to not discuss the investigation, would fail to protect its legitimate interest in the integrity of the investigation. Since a no-contact order in these situations is so impractical and difficult to obey, we believe the privacy interest would prevail in a proper application of the balancing test.

#### **4. Inquiry into, or reliance on, an employee’s or applicant’s sexual history, absent sufficient governmental justification, violates constitutional privacy rights.**

A related employee privacy interest is recognized where a public employer seeks to question an applicant or employee about sexual history and other intimate matters. In Thorne v. City of El Segundo (9th Cir. 1982) 726 F.2d 459, the Ninth Circuit held that such questioning must be justified by a strong showing of countervailing governmental interests, ordinarily including evidence that such information may impact on job performance. The Court of Appeals condemned both the questioning and the employer’s reliance on the answers to reject the applicant.

The plaintiff in Thorne was a female civilian clerk-typist employed by the police department, who responded to a public invitation for civilian employees to compete for police officer positions by submitting to written and oral interviews, psychological testing, a background investigation and a polygraph. At the time she submitted to the polygraph, she outranked all male candidates. The

polygrapher told her she would be asked about a pregnancy and miscarriage in her medical history, and who the father was. She reluctantly revealed the father was a married officer with the department, and asked the polygrapher to keep the information confidential. The polygrapher went on to ask a series of questions about her sexual history. *Id.* at 462.

The polygrapher reported the affair to the chief, and volunteered a personal opinion that Thorne was unqualified because of lack of aggressiveness and physical strength. The chief then met with Thorne and told her that he could not guarantee confidentiality of the affair if she pursued her application. After Thorne decided not to withdraw, the background investigator issued a non-confidential report disclosing the affair, and concluding that Thorne had a poor attendance record, barely passed the physical agility test, and was a “very feminine type person who is apparently very weak in the upper body.” *Id.* at 463.

Thorne was disqualified, and the highest ranking male candidate was hired. Thorne brought a civil action under Title VII for gender discrimination in hiring, and under 42 U.S.C. section 1983 for violation of privacy rights in the disclosure of the affair and reliance on it to reject her application. Trial Judge Manuel Real dismissed the case, and the Ninth Circuit reversed on both claims. On the gender discrimination claim, the Ninth Circuit emphatically discounted the department’s attempted neutral explanations based on attendance and physical strength. *Id.* at 464-468. But for this article, our discussion of the case is directed more specifically toward the court’s dissection of the city’s defense to the privacy claim.

In reversing dismissal of the privacy claim, the Ninth Circuit first observed, “The constitution protects two kinds of privacy interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. Both are implicated in this case. Thorne presented evidence that defendants invaded her right to privacy by forcing her to disclose information regarding personal sexual matters. She also showed that they refused to hire her as a police officer based in part on her prior sexual activities, thus interfering with her privacy interest and her freedom of association.” *Id.* at 468, citation omitted.

The Ninth Circuit concluded that “Thorne’s employment was indeed conditioned on her answering questions regarding her sexual associations.” *Id.* The polygraph instructions given to Thorne attempted to justify the sexual questioning by stating that “On-the-job sexual or perverted deviancies can be cause for termination of employed personnel.” *Id.* at 469. The trial court had found that sexual relations among officers was “an appropriate matter of inquiry with respect to employment in light of their possible adverse effect on morale, assignments, and the command-subordinate relationship.” *Id.* But the Ninth Circuit observed, “the inquiry in this case was not limited to this sort of information.” *Id.* The polygrapher “was quite clearly concerned with whether Thorne had had an abortion, a matter totally irrelevant to ‘on-the-job sex.’” The Ninth Circuit noted that the department’s justification for the questioning was contrived. *Id.*, fn. 9.

The opinion clarified, “We do not hold that the City is prohibited by the constitution from questioning or considering the sexual morality of its employees. If the City chooses to regulate its employees in this area or to set standards for job applicants it may do so only through regulations

carefully tailored to meet the City's specified needs. The evidence established here that the City had no policy." *Id.* at 470, footnote omitted.

The Chief had "simply applied the moral standards of the general society, as he saw them." *Id.* The polygrapher's questioning into sexual activity "Was not regulated in any way. He was given free reign to inquire into any area he chose." *Id.* The City had "set no standards, guidelines, definitions or limitations, other than the polygraph examiner's own personal opinion, as to what might be relevant to job performance in a particular case." *Id.*

The Court found that this type of "unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action. We cannot even bestow legitimacy on the defendants' search for 'perverted deviancies' in this case, because of the complete lack of standards for the inquiry. The risk that an infringement of an important constitutionally protected right might be justified on the basis of individual bias and disapproval of the protected conduct is too great." *Id.*

Finally, the Ninth Circuit concluded that "Even had the questions in this case been permissible, the use of the information in the decision to disqualify Thorne was not." *Id.* at 471. The affair had ended. Thorne had been truthful in the polygraph exam. There was no evidence of deviant behavior. Thus, "In the absence of any showing that private, off-duty, personal activities of the type protected by the constitutional guarantees of privacy and free association have an impact upon an applicant's on-the-job performance, and of specific policies with narrow implementing regulations, we hold that reliance on these private non-job-related considerations by the state in rejecting an applicant for employment violates the applicant's protected constitutional interests and cannot be upheld under any level of scrutiny." *Id.*

The appellate court recognized, "The affair was not a matter of public knowledge, and could not therefore diminish the department's reputation in the community. There was no reason to believe Thorne would engage in such affairs while on duty, or that the affair which had ended was like to revive or cause morale problems within the department." *Id.* Furthermore, Thorne's conduct would not be a ground for discipline. *Id.* Therefore, "the district court erred in finding that neither the questioning of appellant regarding her sex life nor reliance on the information obtained about her sex life violated her privacy and associational interests." *Id.*

Despite the conservative drift of social and judicial views in the generation since Thorne was decided, the bedrock principles of the decision remain firm: absent strong justification, usually related to job performance, a public employer must respect the privacy of employees and applicants on intimate matters of association and sexual relations, and can be held liable under federal civil rights law for unjustified questioning, unnecessary public disclosure, and unwarranted reliance on, these categories of sensitive information.

## **Conclusion**

In general, as can be perceived from the preceding discussion, the tension between the needs of internal investigation and the interests of intimate relationships raises issues that have no easy

answers. In proposing resolutions to this tension, it is not always clear which party benefits from a particular solution.

For example, consider a situation where a law enforcement employer conducting a misconduct investigation that involves both members of a married couple, refuses to issue a no-contact order to subjects of an investigation out of fear of violating employee constitutional rights. Suppose then that one of these married employees for some reason prefers to have the protection of a no-contact order. That employee could probably obtain a temporary restraining order under the circumstances. But temporary restraining orders have their own adverse consequences to a police career. So the employee may feel that an internal order is preferable to a court order in this situation, despite its suspect constitutionality. This hypothetical illustrates that these issues are not purely legal, political, or ideological in character or impact, and can rarely be reduced to a simple formula or a generic solution.

As an employer or supervisor, one helpful thought process to avoid running afoul of your employees' constitutional rights when contemplating giving a no-contact order is to remember your own past as a subordinate employee and ask yourself if you would have had the ability to obey such an order if it was given. As an employee, the best way to protect your interests is to be sure you understand the precise scope of your instructions, and if you suspect the lawfulness or constitutionality, try to get the instructions reduced to writing. If an order severely burdens an important personal relationship, consult qualified legal counsel at once.

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