

# Employee First Amendment – A Case Study

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# Public Employees are entitled to due process

- ▶ Before a government employer can deprive a government employee of a vested property right, such as a permanent job, the employee is entitled to some level of due process
- ▶ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)
- ▶ “Some kind of notice and hearing”

# Law Enforcement Officers' Bill of Rights LEOBR

- ▶ Maryland law (and some other states) sets specific procedures for investigation and adjudication of administrative misconduct allegations.
- ▶ Special notice provisions, right to counsel, timelines, to a contested hearing and appeal to court.

# Other Concerns - Employee Discipline

- ▶ Infringement on constitutional rights
- ▶ State and federal worker protection and anti-discrimination statutes
- ▶ Community demands for accountability

# Case Study Involving Public Employee First Amendment Rights

- ▶ Case # 1
- ▶ Deputy sheriff involved in use of force incident.
- ▶ Prepares poorly written reports.
- ▶ Supervisors concerned that reports do not accurately and completely provide justification for use of force.

# Supervisory Counseling

- ▶ Supervisors counsel deputy about clarifying report.
- ▶ “I will not change my report.”
- ▶ Agency charges employee with improper use of force after conducting internal investigation.

# Employee Response

- ▶ Upon learning of charges, employee takes agency documents and faxes them to television stations, Office of the Attorney General, Police Training Commission, senators and congress members alleging corruption by sheriff “cover up by making me change my reports.”
- ▶ Agency charges employee with unauthorized dissemination of agency documents.

# Unauthorized Dissemination

- ▶ “A deputy shall treat the official business of the Agency as confidential. Information regarding official business shall be disseminated only to those for whom it is intended in accordance with established Agency procedures. A deputy shall not divulge the identity or a person giving confidential information, except as authorized by proper authority in the performance of duties.”



# Adjudication of Charges

- ▶ Hearing Board finds officer not guilty of unreasonable use of force.
- ▶ But guilty of unauthorized dissemination and related conduct unbecoming.
- ▶ Board recommends 5 day suspension from duty.
- ▶ Sheriff increases penalty to termination due to poor work history and trustworthiness issues.

# Employee Response

- ▶ Appeals final termination decision to State circuit court as “arbitrary and capricious.”
- ▶ Files Sec. 1983 suit against State, county and sheriff in official and individual capacity.
- ▶ Sheriff is a state constitutional officer.

## Outcome - State Appellate Case

- ▶ State circuit court affirms Sheriff's actions, but state appellate court reverses termination and reinstates employee with back pay.
- ▶ Employee sues MD Police Training Commission when it requires background investigation, psych and medical exam for recertification.

# Outcome - Federal Case

- ▶ Suit against Sheriff based on First Amendment claims survives motion for summary judgment on qualified immunity grounds.
- ▶ First amendment defense never raised in administrative case - and state appellate court rejected claim as not preserved.

# Parties to the federal suit

- ▶ State and County dismissed as defendants based on sovereign/governmental immunity.
- ▶ Only defendant to go to trial is Sheriff in individual capacity.
- ▶ Trial did not go well for the Sheriff.

# Key First Amendment Issues - 3 Elements

- ▶ The public employee must have spoken as a citizen, not as an employee, on a matter of public concern

## Second Element

- ▶ Employee's interest in the expression must outweigh the employer's interest in providing effective and efficient services to the public

## Third Element

- ▶ There must be a sufficient nexus between the protected speech and the retaliatory employment action



# Not Entitled to Constitutional Protection

- ▶ Work-related gripes and grievances
- ▶ Speech addressing private concerns
- ▶ Statements made in capacity as a public employee
- ▶ Speech that is part of the duties and responsibilities of the employee
- ▶ Speech that unreasonably disrupts the workplace and impairs working relationships

# Verdict

- ▶ In favor of the deputy for \$1.1 million.
- ▶ State and County have no legal duty to indemnify or pay judgment on behalf of sheriff.
- ▶ Deputy collection efforts results in garnishment of Sheriff's wages (he has no assets).

# Additional Collection Efforts

- ▶ Deputy files against State and County again to find money.
- ▶ Heavily litigated - extensive settlement efforts with magistrate judge.
- ▶ Final offer of \$200,000 rejected.

# End of Federal Litigation

- ▶ Federal court prevails on deputy to dismiss fruitless claims against the State and County.
  - ▶ His attorney quits without being paid.
  - ▶ Deputy is reinstated but with limited assignments.
- 
- ▶ *Durham v. Jones*, 2011 U.S. Dist. LEXIS 43204
  - ▶ *Durham v. Jones*, 2012 U.S. Dist. LEXIS 128360, *aff'd* 737 F. 3d 291 (4<sup>th</sup> Cir. 2013)

# Duty Assignment

- ▶ Full powers restored but duty limited to courthouse security

## Two years later - Case #2

- ▶ Other misconduct reported
- ▶ Domestic incident alleging “woman with a gun in my house”
- ▶ Extensive law enforcement response

George Walker - you punk ass mf, I'm  
calling you out, whoever the fuck you are,  
just because Kathleen E. [REDACTED] got you to  
try to threaten me, the facts are the facts, I  
have been fucking her for the past year and I  
have the records to prove it! So fuck you  
and your mom! Don't your ever Fucken  
[REDACTED] ten me again! You don't know me, but  
[REDACTED] s my number bitch 443-614-8965!

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# Facebook Posting

Expression as a private citizen?





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Troy Durham

11 minutes ago

George Walker - you punk ass mf, I'm calling you out, whoever the fuck you are, just because Kathleen E. Smith got you to try to threaten me, the facts are the facts, I have been fucking her for the past year and I have the records to prove it! So fuck you and your mom! Don't your ever Fucken threaten me again! You don't know me, but this is my number bitch 443-614-8965!

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Troy **Durham**

Yes it's true BP, I have been fucking her for the past year! I am not hard to find! I'm done with her and all of her lies and being fake! I am giving her back to you! She really used me and played me like like a fool, but it's all good! I always keep it real, even if it hurts a little! BP here is my cell number 443-**514**-8965! I hope that we all can still be friends!

4 Likes · 4 Comments



Like



Comment



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Troy **Durham**

6 hours ago

Fake people!

10 Likes · 6 Comments



Like



Comment



Share



Troy **Durham** shared a link.

8 hours ago



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Troy Durham

1 hour ago via iOS

Kathleen E. Smith - I hope and pray that what you did to me today and tonight was all worth it! You better get on your knees tonight and suck your husband's dick, because I'm telling it all! You should of never crossed me!



Facebook



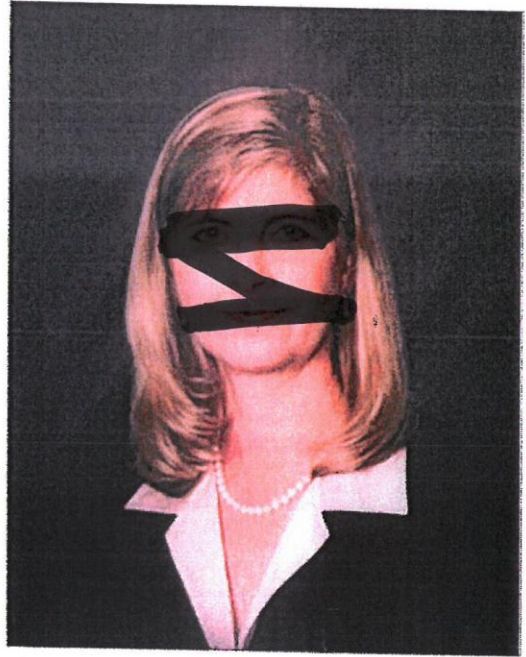
Go to a public group



Troy Durham

Friends · 125 ·

Yes it's true BP, aka Charles Hugh Bean I have been fucking your wife Kathleen E. [redacted] for the past year! I am not hard to find! I'm done with her and all of her lies and being fake! I am giving her back to you! She really used me and played me like like a fool, but it's all good! I always keep it real, even if it hurts a little! BP here is my cell number 443-8965! I hope that we all can still be friends!



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Write a comment



Lorena Smith Mike Thoma · 11 hours · 6 · 1 · 1 ·





Troy Durham



Troy Durham

53 minutes ago

Once a whore always a whore!

0 Likes



Like



Comment



Share



Troy Durham

54 minutes ago Edited

BP you are getting lucky tonight, you can  
thank me tomorrow ;-)

1 Comment



Like



Comment



Share



Troy Durham

1 hour ago

Yes BP, I'm talking about your wife Kathleen  
E. Smith (443-232-5754), she broke my  
heart today and now it's my turn to break



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Troy Durham

1 hour ago

Yes BP, I'm talking about your wife Kathleen E. Smith (443-235-5754), she broke my heart today and now it's my turn to break her heart and everyone already knows that I'm crazy, so I'm going to tell it all ;-)

2 Likes 5 Comments



Like



Comment



Share



Troy Durham

1 hour ago

Wow!

4 Likes



Like



Comment



Share



Troy Durham

3 hours ago

Yes it's true BP, I have been fucking her for



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## Post



**George Walker**

Mr Durham perhaps you should rethink this course of action. Not only have you committed Conduct Unbecoming, slander, and deformation of character. But I'm sure someone at your place of employment would be very interested in this course of conduct. You've had your say now take it down before you cross to far over the line.

27 minutes ago · Like 1



**Troy Durham**  
Fuck you!

27 minutes ago · Like 1



**Troy Durham**  
George- just for your record I have been fucking her the past year, I have the records to prove!

27 minutes ago · Like 1



**Troy Durham**



Write a comment...



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Troy Durham

19 minutes ago Edited

Time for a movie and to relax - don't forget Facebook is a form of free speech and is all in fun and good play and is even better when you have records to back up what you are expressing, just in case someone wants to play games ;-)

There is nothing wrong in preparing and making notes for a book under our freedom of speech laws!

1 Like

Like

Comment

Share

Troy Durham

35 minutes ago

ge Walker - you punk ass mf, I'm  
a you out. whoever the fuck you are.





# Administrative Misconduct Charges Filed

- ▶ Charges include conduct unbecoming
- ▶ Question: Does your agency have a social media policy? Do you need one?

# Outcome of Administrative Hearing

- ▶ Found guilty of all charges
  - ▶ Hearing Board recommends termination
  - ▶ Sheriff accepts and imposes recommendation
- 
- ▶ Sheriff retires - garnishment stops
  - ▶ Deputy does not appeal the termination



Defense #2

# Last known event

- ▶ Attorney from federal case files suit against deputy for fees; obtains lien on house
- ▶ Forces sale of house at auction.
- ▶ One week later, the house burns to the ground and the State fire marshal is looking for the deputy.

# Resources

- ▶ AELE Law Enforcement Legal Center
- ▶ AELE Monthly Law Journal: April and November 2010
- ▶ AELE.org