CAN'T BUY SILENCE IN BALTIMORE

By: Jack Greiner on July 23, 2019 on graydon.law

When the city of Baltimore settles civil-rights lawsuits alleging police misconduct, it requires settling claimants to agree to a "non-disparagement clause," where they promise not to speak to the media about their underlying allegations. Ashley Overbey, a claimant who settled her case but then spoke about it publicly, claims that Baltimore violated her First Amendment rights when it enforced the non-disparagement clause against her.

So the case raises the question whether private contract rights can prevail over the First Amendment. The court in Baltimore sided with the First Amendment.

Overbey sued three officers of the Baltimore Police Department, alleging that the officers had beaten, tased, verbally abused, and needlessly arrested her in her own home after she called 911 to report a burglary. Eventually, Overbey agreed to settle her suit for $63,000. Overbey's settlement agreement included a "nondisparagement clause." It required Overbey to "limit [her] public comments" regarding her lawsuit "to the fact that a satisfactory settlement occurred involving the Parties." And it provided that if Overbey ever made a prohibited comment regarding her lawsuit, the City would be entitled to a refund of half of her settlement. The clause placed no restriction on the City's freedom to speak about the case.

While the city was considering whether to approve the settlement, the Baltimore Sun published Overbey's name, photograph, address, and the amount of her proposed settlement. The Sun's story included several anonymous comments implying that Overbey had initiated a confrontation with the police in hopes of getting a payout from the City. Overbey posted responses to the comments, insisting that the police had been in the wrong and describing some of the injuries she had suffered.

The City determined that Overbey's online comments in the Sun article violated the non-disparagement clause. Consequently, once Overbey's settlement was approved, the City remitted only half of the agreed payment—$31,500—to Overbey's attorney. It retained the other half as "liquidated damages."

The court agreed that in some circumstances, a person can waive constitutional rights. But the question here was whether the waiver was void. In reaching its decision, the court weighed the waiver against the public policy interests in having the information publicly

available. The court was troubled by the notion that the city could force silence on a topic that made it look bad.

In defense of the clause, the city argued that it protected the First Amendment right "not to speak." The court was unimpressed, noting "a limitation on the government's ability to purchase citizens' silence does not meaningfully compromise the 'individual freedom of mind' protected by the right not to speak."

The City also argued that the officers have a personal interest "in clearing their names." But the court noted that the settlement agreement neither admits wrongdoing nor vindicates any of the parties involved. So to the extent that the officers have an interest in clearing their names, enforcing the non-disparagement would not help them.

The City also contended that both it and the officers involved have an interest in avoiding "harmful publicity." But the court noted that "[e]nforcing a waiver of First Amendment rights for the very purpose of insulating public officials from unpleasant attacks would plainly undermine that core First Amendment principle."

So a city can certainly avoid litigation by settling a police misconduct case. And the victim can take the money. But the First Amendment won't allow forced silence to be part of the bargain.

THE FIRST AMENDMENT AND AN INFLATABLE RAT

The reach of the First Amendment continually amazes me. The most recent example is a battle over the use of an inflatable rat, named "Scabby," to protest allegedly unfair labor practices.

The NLRB recently found itself in a federal district court in New York seeking a temporary restraining order prohibiting the Construction & General Building Laborers' Local 79 Union from displaying Scabby in front of a Shop Rite market owned by the Mannix family.

The Mannix family operated several Shop Rite stores through their family business and had entered into an agreement to operate a Shop Rite market at a new facility still under construction. According to Local 79, the construction company – GTL Construction – uses non-union labor and pays below market wages. To protest these practices, Local 79 set up the inflatable rat with a flyer attached to its stomach that said "Shame on you Kevin Mannix!!" along with a message about how Mannix was allowing GTL Construction to build its new supermarket using "exploited construction workers."

The NLRB believed the Local's conduct constituted a "secondary boycott" and an unfair labor practice. Generally, a union can't "force or require" people to stop doing business with someone other than the primary employer. Here, the primary employer was GTL Construction. So any efforts aimed at Mannix and the Shop Rite stores were "secondary."

But it's not as easy as that. The Local's efforts constitute speech, which brings the First Amendment into play. And in the court's view it mattered what the Local actually said. Based on its review of the evidence, the court concluded that "there is no evidence that Local 79 representatives in any way induced or encouraged employees to refuse to perform services for Mannix or the Mannix owned stores, let alone that such inducement or encouragement was coercive." And the court went on to note that "the record contains no evidence indicating that the inflatable rat [was] a 'prearranged or generally understood signal' meant to induce or encourage the Mannix employees to cease work."

The text of the flyers, in the court's view, "did not call for or declare a strike or any other form of job action, but instead explained the nature of the labor dispute and asked readers to express their support for the union's position." In short, "a message about a secondary employer does not violate [the NLRB] just because it might reach the eyes and ears of secondary employees and might cause them to think bad things about their employer. To hold otherwise would . . . completely eviscerate the First Amendment rights of the union." In support of its ruling, the court cited to five federal cases approving the use of giant inflatable rats. I had no idea it was a thing.

The court denied the request for the Restraining Order. The First Amendment frequently requires courts to balance competing interests and the ruling in this case is no different. Even Scabby has rights apparently.