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# *Employer Ban on Officer Speech Violates First Amendment*

## *Moonin v. Tice*, No. 15-16571 (9th Cir. 2017)

**United States Court of Appeals for the Ninth Circuit, Filed August 22, 2017**

***By Robert Rabe and Michael P. Stone***

The United States Court of Appeals has held that a public employer may not subject all employee speech regarding a particular government program to a blanket ban. The case arose from a dispute regarding the management of the Nevada Highway Patrol (NHP) canine drug detection unit. Major Tice sent an email to all K9 program officers stating, "Effective immediately, ... there will be NO direct contact between K9 handlers, or line employees, with ANY non-departmental and non-law enforcement entity or persons for the purpose of discussing the Nevada Highway Patrol K9 program or interdiction program, or direct and indirect logistics therein. All communication with ANY non-departmental and non-law enforcement entity or persons regarding the Nevada highway Patrol K9 program or interdiction program, or direct and indirect logistics relating to these program WILL be expressly forwarded for approval to your chain-of-command. Communication will be accomplished by the appropriate manager/commander if deemed appropriate. Any violation of this edict will be considered insubordination and will be dealt with appropriately." Moonin, who had been a trooper in the K9 program, claimed that the policy announced by Tice, prohibiting officers from the discussing the program with any non-departmental entity or person, was designed to prevent officers from making the problems in the K9 program

known to the public. The Court held that the broad policy imposed by the email violated the First Amendment.

The Court had to determine if the email imposed an unconstitutional "prior restraint" on the K9 troopers' speech. The Court was guided by a two-step analysis, derived from the Supreme Court's decision in *Pickering v. Board of Education*. First, the Court had to decide if the restriction impacted a government employee's speech "as a citizen on a matter of public concern." If so, then the question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public, as by disciplining or discharging him on the basis of speech. The first step of the analysis involves two inquires: whether the restriction reaches only speech within the scope of a public employee's official duties, and whether it impacts speech on matters of public concern.

When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes. The government contended that since troopers are required to report misconduct within the department, the speech at issue would have fallen within Moonin's official duties. The Court concluded that even if troopers are required as part of their jobs to report some kinds of misconduct internally, the email forbids speech about many topics besides misconduct - such as disagreements about the best K9 training protocols. Under the policy at issue, troopers were not allowed to convey their opinions about any aspect of the K9 or drug interdiction programs to legislators or community groups. Thus, the policy covered speech outside the troopers' official duties, even though some speech within those duties is also covered. It was also argued by the government that the release of factual information or official records could jeopardize ongoing or future investigations, but the Court noted the policy made no distinction between speech about the K9 program that reasonably could be expected to disrupt NHP's operations and speech that plainly would not, or that would do so only inasmuch as it engendered legitimate public debate about the management of the program.

The Court then had little difficulty concluding that the policy announced in the email reached speech on matters of public concern. The email policy would encompass a troopers' informed opinion about the

trajectory of the K9 program. In *Pickering*, the Supreme Court concluded that even if based on false information, a teacher's letter to a newspaper criticizing the school board's allocation of funds and its communication with taxpayers could not serve as the basis for the teacher's dismissal. Just as the contents of the teacher's letter to the newspaper in *Pickering* were a matter of public concern, a difference of opinion as to the preferable manner of operating the K9 program clearly concerns an issue of general public interest. The Court noted that the troopers' freedom to offer their informed opinions about the direction of the K9 program on their own time, as concerned citizens, is a prerogative that the First Amendment protects.

The Court concluded that government employers have significant and legitimate interests in managing the speech of their employees, particularly where the employees' speech pertains to their work. And, policies explaining how sensitive information should be handled benefit both employers and employees. However, a government employer's policies imposing prior restraints on their employees' speech as citizens on matters of public concern, must bear a "close and rational relationship" to the employer's legitimate interests, and the broad policy the email announced in this case did not meet this standard.

So, while government employers, like private employers, need a significant degree of control over their employees' words and actions, and peace officers may be subject to restraints on their speech that would be unconstitutional if applied to the general public, a law enforcement agency may not subject all employee speech regarding a particular government program to a blanket ban. Be Safe!

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