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Recent Developments: Berger and Barhight v. Battaglia and Baltimore Police Dep't.: Public Employer and Employee's First Amendment Rights

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Recent Developments

Berger and Barhight v. Battaglia and Baltimore Police Dep't.: **PUBLIC EMPLOYER AND EMPLOYEE'S FIRST AMENDMENT RIGHTS**

On December 20, 1985, the United States Court of Appeals found that the Baltimore City Police Department could not, consistent with the first amendment, require an officer to refrain from his off-duty musical performances to maintain his employment.

Robert Berger had been a member of the Baltimore City Police Department since 1972. During the last three years of his employment as an officer, the department was aware that he often performed, off-duty, as a singer and musician in the Baltimore area. Prominent in his act was an impersonation of Al Jolson, which he performed in blackface and a black wig. Berger played primarily to family audiences and "urged no conduct, incited no activity, made no derogatory or inflammatory remarks, advocated no lawlessness and sought no confrontation." *Berger and Barhight v. Battaglia and Baltimore City Police Dep't.*, 779 F.2d 992, 993 (4th Cir. 1985). He never identified himself as a police officer or made any comment on departmental policies.

In early 1982, Berger agreed to a two week run of performances in a Baltimore hotel. He was to receive no pay in accordance with departmental regulations. As promotional advertisement, the hotel placed a notice of Berger's scheduled performance along with a picture of him in blackface in Baltimore newspapers. The ad offended some members of the black community and on February 9th, approximately thirty people formed a picket line outside the hotel to protest the performance in blackface. As the time for the performance approached, some of the demonstrators entered the hotel to prevent the performance. The police department's Community Relations officer on duty at the hotel that night requested additional police assistance because of a rumor of possible violence. The potential altercation was avoided, however, when the hotel management cancelled the show.

Following the cancellation, the police department received numerous complaints from black citizens that a police officer was being permitted "to offer a public insult to members of their race." *Id.*, at 995. As a result of these complaints, the department became concerned that the vehement reaction by the city's black citizens would seriously jeopardize its efforts at maintaining improved community relations between the department and the black community. In response to the complaints, Deputy Commissioner Rochford ordered Berger to cease all public performances while he remained on light-duty status. (In 1979, Berger had been injured while in-the-line-of duty). Berger's attorney sent Rochford a letter concerning the order, and several days later Berger was ordered to return to full-duty by the department's medical section. On this same day Berger was also ordered to stop appearing in blackface or be found in violation of a department rule prohibiting actions that discredit a police officer or the department.

The district court held that, although Berger's right to perform an Al Jolson impersonation was protected by the first amendment, the police department's "interests concerned with the threat of future disruption of order and harmonious relationships" with the black community outweighed Berger's right to freedom of speech. *Berger v. Battaglia*, No. B-82-880 (D. Md. March 21, 1984).

In reviewing the district court's application of the balancing test found in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and elaborated in *Connick v. Myers*, 461 U.S. 138 (1983), the court of appeals first established that Berger's "speech" was indeed protected by the first amendment. It was a matter of public concern and, although considered sheer entertainment and content-neutral, these qualities did not remove it from the constitutional protection. *Stanley v. Georgia*, 394 U.S. 557, 566 (1969). The court then balanced the value of Berger's speech against the importance of the department's interests. The court stated that this type of entertainment/speech by a public employee should enjoy the same first amendment protection as comparable artistic expression would enjoy when performed by a privately employed citizen. The court further noted that this protection is only slightly less than that afforded political and social commentary. *Berger*, at 999.

In considering the department's interests, the court applied the standards established in *Pickering* and *Connick* that "the only public employer interest that can outweigh a public employee's recognized speech rights is the interest in avoiding direct disruption, by the speech itself, of the employment relationship." *Berger*, at 1000. The district court found no such disruption of internal operations and the court of appeals agreed. In this case the possible disruption was only to *external* relationships and was caused by the threatened reaction of the offended citizens, *not by the speech itself.* The court further stated that the appropriate response of the department to the insulted citizens should have been that their right to peaceably protest would have been as vigorously protected as Berger's right to perform.

In reversing the district court's decision, the court of appeals established that first amendment protection of content-neutral artistic expression deserves only slightly less weight in a balancing test than does highly valued political/social commentary. The court of appeals reestablished that a public employer can violate an employee's right to freedom of speech on a matter of public concern when it disrupts the internal functioning of its organization, but not in response to possible public disorder by citizens who find the speech offensive.

—Malinda S. Siegel