



Lindke v. Freed

Background information and recommended next steps for municipalities

FOR QUESTIONS

Jared Tingey, Legal Director
Cameron Diehl, Executive Director

801.531.1872
www.ulct.org

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Introduction

In the age of Facebook, X (formerly Twitter), Instagram, Tik Tok, and many other online outlets to voice personal opinions, share stories, and post pictures, it is almost expected for elected officials and other government employees to create their own personal social media accounts. As public figures make social media posts on their personal accounts, the line between private posts and public posts becomes hazy.

This distinction is critical in determining whether there has been a violation of another person's right to free speech. Employees and others representing the government on the government's behalf can be held responsible for infringing on another's right to free speech. If an individual is posting in their private capacity, then the free speech rights do not apply. Private employers are not bound to honor the rights of another's free speech rights—only those who are government officials. Those who work for the government are citizens too with first amendment rights to free speech.

So, the paramount question then is:

When does a government employee's actions constitute an official act of the "state" (or local government)?

On March 15, 2024, the Supreme Court answered this question, among others, in the case *Lindke v. Freed*, 144 S. Ct. 756 (2024).

The purpose of this white paper is to explore the facts of this case, the legal issues the Court grappled with, and how this case may impact you and your municipality.

Factual Summary

Facebook Account Creation

At some point prior to 2008, James Freed (“Freed”), then a college student, created his own private Facebook profile that he shared only with his “friends.” In order to become Facebook friends, one must request to be another user’s friend and that user must accept the request. Once Facebook friends, both users can see each other’s posts, photos, and other information about each other. When Freed had almost met Facebook’s limit of the number of friends, he converted his profile to a public Facebook “page.” By being a Facebook page, the public at large (and not just friends) could see all posts, pictures, and other content as well as be able to respond to his posts. He named the page “James Freed” and categorized the page as “public figure.”

Appointment as City Manager

In 2014, Freed was appointed city manager of Port Huron, Michigan. Freed updated his Facebook page to reflect his new position, changed his profile picture to a photo of himself in a suit with a city lapel pin, and added a link to the city’s website and general email address. He also described himself as “Daddy to Lucy, Husband to Jessie and City Manager, Chief Administrative Officer for the citizens of Port Huron, MI.” Freed posted on his page often and primarily about private activities—from family outings to his home improvement projects. On occasion, however, he did post about public events. For example, he posted about the reconstruction of the city’s boat launch, highlighted city communications, answered general questions, solicited feedback from the public, and posted about other city related affairs.

COVID-19 Pandemic

Then COVID-19 hit, and with it, the volumes of opinions, standards, restrictions, and changes to policies and procedures. In response, Freed began posting various opinions of his own – “stay safe” and “save lives.” He also included other information such as case counts and weekly hospitalization numbers, a description of the city’s hiring freeze, and a screenshot of a press release about a relief package that he helped prepare.

Deletion of Kevin Lindke’s Comments and Blocking

Kevin Lindke, a resident of Port Huron, thought that the city’s approach to the pandemic was “abysmal” and posted on Freed’s page that “the city deserves better.” He also

criticized him for eating at expensive restaurants instead of spending that time talking to members of the community. As he had done with others, Freed deleted “derogatory” or “stupid” comments, including Lindke’s individual comments, and after some time, ultimately blocked Lindke from commenting altogether.

Lawsuit Filed

Lindke sued Freed and argued that Freed, acting as a public official, had limited his right to free speech under 42 U.S.C. 1983 (a law protecting a citizen’s constitutional rights) by selectively deleting comments contrary to his viewpoints and blocking people who made them. At District Court, Freed argued that his Facebook page was his personal Facebook page and therefore Lindke’s free speech claims did not apply. The District Court sided with Freed, finding determinative that:

- (1) Freed’s posts were primarily personal in nature;
- (2) Freed’s account lacked any sort of government involvement such as staff or resources being used to manage it; and
- (3) Freed’s posts about official city business were few in number.

Case Appealed

The Sixth Circuit Court of Appeals agreed with the outcome of the District Court’s opinion. Lindke persisted and filed an appeal to the United States Supreme Court. The Supreme Court agreed to hear Lindke’s appeal to resolve the outstanding conflicting views because there existed conflicting opinions across several appellate courts.

The Supreme Court's Answers

By a unanimous decision, the Supreme Court vacated the 6th Circuit's opinion and remanded it for further deliberation based on the Supreme Court's standard set forth in the case.

The case was filed as a "1983" action, which is an action based upon 42 U.S.C. 1983. Section 1983 permits a cause of action against every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State deprives someone of a federal constitutional or statutory right. Therefore, in order for a 1983 action to be successful, one must show that the action that violated their constitutional rights was one coming from the State (or other local governmental entity).

At a high level, the Supreme Court held that:

A public official's social-media activity constituted state action

for purposes of 42 USC 1983 and the First Amendment only if:

The official possessed actual authority to speak on the State's behalf and

Purported to exercise that authority when he spoke on social media.

Actual Authority

The first prong of this test – having actual authority – is based on the premise that in order to misuse power, one must possess it in the first place. Put another way, regardless of how "official" a citizen's actions look, the individual's apparent authority cannot equate to actual authority when determining whether civil rights were violated. For one to have actual authority, they must obtain it from one of five sources: statute, ordinance, regulation, custom, or usage. While the first three sources are written and easy to determine, "custom" and "usage" can be much more difficult to nail down. The Court defines custom and usage as "persistent practices of state officials that are so permanent and well settled that they carry the force of law." A good indicator to determine if custom and usage have become the defacto law is to ask long-time government employees why a person performs a certain job task. If their answer is "We've always done it that way!", then you can rest assured that it has risen to well settled unwritten law.

The Court also considered the scope of authority to be determinative. The question is not just whether they possess actual authority, but possess actual authority *for that specific action*. A Public Works Department Head may be given actual authority to post or comment on the city's behalf related to road closures, but their actual authority is limited in scope to road closures and other public works related items.

Purported to Use Their Authority

The second prong of this test is to determine whether the person spoke in their personal capacity or was speaking to fulfill their authorized official duties. The Court's reasoning was explained further by pointing out the differences of someone posting on an "official page" of a political subdivision versus a page that is designated as "private."

The same statement concerning some city requirement can be both public or private, depending on the context and environment in which the statement was given. For example, a fire chief who posts fireworks restrictions on the city's webpage a week before July 4th celebrations can certainly be considered an appropriate public post. On the other hand, the same fire chief may attend a July 4th party she was invited to by her neighbors and while there, casually converse with other residents about the same fireworks restrictions she posted online. Her posting would likely be considered "acting on behalf of" or purporting to use her authority; her neighborly conversation would likely not be considered acting on behalf of the State.

Additional Consideration

The Court also found a distinction between Freed's deleting of specific comments and blocking Lindke altogether. If the line between private speech and public speech is hazy, the content of the employee's post or comment will become much more meaningful to determine whether an individual's free speech rights were violated. If after analyzing whether a person acted under state authority and purported to use it, it is determined that some posts are private and other posts are public, then blocking all comments from users will be seen as a violation of free speech for all instances in which the posts are considered public. On the other hand, if an employee deletes only the comments on posts that are considered private and leaves untouched all other comments on posts considered public, then there would likely not be any violation.

Impacts to Your City or Town and Suggested Changes

This case likely impacts your city or town's social media policies. You will want to make sure to reevaluate them and draft them in accordance with the Court's findings in this case. Further, you should train your employees as to the scope of their authority and the activities permitted and not permitted. Lastly, you may want to consider reevaluating your job descriptions to ensure that the scope of authority is defined appropriate to their position and role within your city.