



## **PUBLIC MEETINGS, FREE SPEECH AND THE FOURTH AMENDMENT**

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On January 23, 2017, the Fifth Circuit Court of Appeals of decided *Heaney v. Roberts et al.*<sup>1</sup>, in which the court discussed the Constitutional legalities pertaining to ejecting a person from a public meeting. The relevant facts of *Heaney*, taken directly from the case, are as follows:

On September 18, 2013, Tom Heaney attended a regularly scheduled Jefferson Parish council meeting in Gretna, Louisiana. In accordance with council rules, Heaney registered to speak during the time allowed for public comment. The rules allowed each registered speaker five minutes to address the council. Heaney wished to speak about the legality of council members accepting campaign contributions from contractors who had applied for and received no-bid contracts from the council. Councilman Christopher Roberts was presiding as chair of the meeting.

When Heaney had been speaking for about three minutes, he was interrupted by Roberts, who asked if he would yield the floor to the Parish Attorney, Ms. Foshee. Heaney believed that he would receive the balance of his time after Ms. Foshee finished speaking given that a prior speaker had been given the balance of her time after yielding. Ms. Foshee spoke for several minutes, expressing her opinion that the council's actions were legal. After she finished speaking, Heaney asked Roberts, "May I have my time back?" and Roberts responded, "Yes, how much time do we have?" Heaney then expressed his wish to challenge the Parish Attorney's opinion. At that point, he was interrupted again by Roberts:

Roberts: Let me, we've had this conversation before, ok?

Heaney: Are you trying to stop me from speaking?

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Roberts: Well you yielded and I do have the floor . . . so . . . I'm not going to turn this into a circus, ok? If you don't believe what Ms. Foshee's comments were—

Heaney: I—

Roberts: Let me finish. Last I checked, Ms. Foshee had a law degree hanging on the wall in her office. If you're challenging whether or not what she's saying to be accurate or not, you can go right to the elevator downstairs. The Clerk of Court's office is there, and you're welcome to file suit. This is not the forum for you to challenge the opinion of the parish attorney, ok?

Heaney: Now if I can be able to speak—

Roberts: No, let me finish. Let me finish. Once again, I'm going to ask you, are you an attorney?

Heaney: I don't have to be an attorney to read and comprehend a decision—

Roberts: But I'm not going to sit here and have you berate the parish attorney.

Heaney: I have a decision. I have a decision by HUD that contradicts what Ms. Foshee says—

Roberts: Sir, ok. Your time's up and I'm going to ask that you be removed because you're being hostile so if you would please exit.

Heaney: I'm not being hostile.

Roberts: If you've got a problem with that, you can go downstairs . . . This is the third time that you've tried to take issue with something

Heaney: You're trying to stop me from presenting facts that contradict Ms. Foshee. You're taking my time, and you're violating parish ordinance.

Roberts: If you'd please remove the gentleman.

Ronald Black, a police officer with the City of Gretna, responded to Roberts's request to remove Heaney from the chambers. Black approached the podium where Heaney was standing and indicated that he needed to move. Heaney stopped to hand documents to another person as he walked away up the aisle, intending to sit down for the rest of the meeting. He alleges that Black "continued to force plaintiff from the Council chambers" and that Black shoved him forward, causing him to fall to the floor. After getting up, Heaney alleges that Black "seized [him] by the arms and forcibly ejected him from the chambers" into an elevator and down to the first floor. While Heaney awaited an ambulance that had been called for him, Black consulted with his supervisor about whether or not Heaney should be arrested."

Heaney filed suit in federal court against the city, Councilman Roberts, and Officer Black for violations of his rights under the First and Fourth Amendments to the United States Constitution. [Note: This article will not discuss the state claims.] Defendant's Roberts and Black filed motions for summary judgment. The district court denied Councilman Roberts' motion for a First Amendment violation and granted Officer Black's motions for summary judgment on the First and Fourth Amendment claims. The case was appealed to the Fifth Circuit Court of Appeals.

The court first examined the First Amendment claim against Councilman Roberts. The court described the legal standard as follows:

**The constitutional right at issue is the First Amendment right to be free from viewpoint discrimination in a limited public forum.** See *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) (per curiam) (explaining that limited public forums "describe forums opened for public expression of particular kinds or by particular groups"). **It is beyond debate that the law prohibits viewpoint discrimination in a limited public forum.** See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). **The government can restrict or regulate speech in a limited public forum "as long as the regulation '(1) does not discriminate against speech on the basis of viewpoint and (2) is reasonable in light of the purpose served by the forum."** *Fairchild v. Liberty Indep. Sch. Dist.*, 597 F.3d 747, 758 (5th Cir. 2010) (quoting *Chiu*, 260 F.3d at 346).

**...Viewpoint discrimination exists "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."** *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); see also *Pahls v. Thomas*, 718 F.3d 1210, 1230 (10th Cir. 2013) (noting that "a claim of viewpoint discrimination in contravention of the First Amendment requires a plaintiff to show that the defendant acted with a viewpoint-discriminatory purpose").<sup>iii</sup> [emphasis added]

Thus, plainly stated, the government can restrict speech at a public meeting as long as the speech is not restricted based on the *viewpoint* of the speaker, and the restriction is reasonable in regard to the purpose of the forum. For example, the government can require a person to speak on only a particular topic and/or can limit the amount of time a person can speak. However, if the government restricts a person speech based upon the viewpoint of the speaker, who is speaking within an approved topic, then the government official may be in violation of the First Amendment.

The court applied the facts of Heaney's case to the legal principals above. At the outset, the court noted that Heaney was speaking on an approved topic and was within his allotted time when he was removed from the meeting. Further, the court noted that Heaney was removed during a conversation where he was disputing the viewpoint of the city attorney. It was during this conversation that Councilman Roberts ordered Officer Black to remove Heaney. As such, the court held that a jury must decide whether that is sufficient evidence of improper motive on the part of Roberts such that it amounts to viewpoint discrimination under the First Amendment. Since the constitutional right is clearly established such that any reasonable government official would have known removal of Heaney was unconstitutional if based on viewpoint, the court affirmed the denial of qualified immunity as to Councilman Roberts.

The court next discussed the First Amendment claim against Officer Black, who was acting as the sergeant at arms of the meeting.

Heaney argued that Black is the person who actually effectuated the First Amendment violation by removing him from the meeting. Heaney cited *Cozzo v. Tangipahoa Parish Council*<sup>v</sup>, in which the court held that an officer cannot rely on following orders to receive qualified immunity when the officer was well versed in the facts of an incident and knew or should have known that he was violating the constitution.

Officer Black argued that he was following a direct order from Councilman Roberts to remove Heaney. Black further argued that in this case, he had no reason to believe that he was violating Heaney's First Amendment rights. The court of appeals stated

We agree with the district court that "**Black was not required to cross-examine and second-guess Roberts regarding his First Amendment motives before acting.**" See *Collinson v. Gott*, 895 F.2d 994, 997 (4th Cir. 1990) (affirming qualified immunity for a sheriff's deputy who escorted a citizen out of a city council meeting upon receiving orders to do so from the presiding officer). Black is entitled to qualified immunity on the First Amendment claim because his actions as sergeant-at-arms were not objectively unreasonable in light of clearly established law.<sup>v</sup>

As such, the court of appeals affirmed the grant of qualified immunity to Officer Black on the First Amendment claim.

The court then addressed the Fourth Amendment claim for unlawful seizure against Officer Black. The court first recognized that seizures of persons are governed by the Fourth Amendment's objective reasonableness standard. The court also noted that clearly Heaney was seized by Officer Black when he was forcibly ejected from the meeting. The court stated

[W]e do not need to determine whether there was probable cause. **Even "[i]f there is no probable cause to arrest, the question of whether qualified immunity nonetheless applies is a separate legal and factual issue."** *Mesa v. Prejean*, 543 F.3d 264, 271 (5th Cir. 2008). **"Even if we find that the right was clearly established at the time of the alleged violation . . . , a defendant will still be entitled to qualified immunity if the defendant's conduct was 'objectively reasonable in light of "clearly established" law at the time of the violation.'" Porter v. Ascension Par. Sch. Bd.**, 393 F.3d 608, 614 (5th Cir. 2004) (quoting *Chiu*, 339 F.3d at 279).<sup>vi</sup>

The court then examined facts of the case relevant to whether Officer Black acted reasonably in seizing Heaney and removing him from the meeting. The court first noted that Black was the sergeant at arms for the meeting and was thus responsible for responding to disruptions at the request of the council president. As such, it was reasonable for Black to believe that he had the legal authority to act upon the request of Councilman Roberts.

The court then held that it was not objectively unreasonable for Officer Black to comply with Roberts's request and escort Heaney out of the meeting and to briefly detain him while he spoke to supervisor. As such, Officer Black is entitled to qualified immunity on the Fourth Amendment claim.

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<sup>i</sup> No. 15-31088 (5<sup>th</sup> Cir. Decided January 23, 2017)

<sup>ii</sup> Id. at 1-4

<sup>iii</sup> Id. at 7-8

<sup>iv</sup> 279 F.3d 273 (5<sup>th</sup> Cir. 2002)

<sup>v</sup> Heaney at 12

<sup>vi</sup> Id. at 13

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