



THE FIRST AMENDMENT AND TATTOO POLICIES

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Law enforcement agencies vary widely on the extent to which they allow officers to have or display tattoos while on-duty. It seems that tattoos are also becoming more prevalent or mainstream in society today which may create a recruiting problem for law enforcement agencies that prohibit or strictly regulate tattoos.

There is largely an absence of case law that can be used as legal guidance on this issue. However, one such case that does address the constitutional boundaries under the First Amendment regarding tattoo policies at a police department comes out of the United States District Court for the Northern District of Illinois. While this case does not consider binding case law that agencies must follow, it does explain constitutional law related to tattoo policies. The case is *Medici et al. v. City of Chicago*¹ and it was decided on October 27, 2015. The facts of *Medici*, taken directly from the case, are as follows:

Plaintiffs are currently employed as patrol officers with the Chicago Police Department (the “CPD”). The City is a municipal corporation organized and existing under the laws of the State of Illinois. Among the City’s divisions is the CPD. Medici, a United States Marine, was hired by the CPD in August 2005. Kukielka was hired by the CPD in December 2009 and Leet has worked for the CPD since November 1999. Prior to accepting employment with the CPD, Kukielka and Leet served in the United States Air Force. Plaintiffs claim that on June 8, 2015, the CPD issued changes to its uniform policy, requiring on-duty officers “representing the Department, whether in uniform, conservative business attire or casual dress,” to cover tattoos on the hands, face, neck, and other areas not covered by clothing, with skin tone adhesive bandages or tattoo covers (the “Tattoo Policy”). Plaintiffs allege that the City not only failed to bargain with the Police Union before changing the dress code, but that it also failed to fully consider possible alternatives to this broad-sweeping ban. Plaintiffs also allege that the City’s explanation for the Tattoo Policy is to “promote uniformity and professionalism.”

Medici has two tattoos—one relating to his military service as a Marine and the other relating to his religious beliefs. Kukielka and Leet each have a religious tattoo. Under the

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Tattoo Policy, these tattoos must be covered up while the officers are on-duty or representing the CPD. Patrol officers who must wear extra clothing or cover-up adhesive bandages allege that since the creation of the Tattoo Policy, they have experienced overheating in warm weather months, as well as skin irritation and discomfort from the adhesive bandages.ⁱⁱ

The officers filed suit in federal district court and alleged that the tattoo policy violated their First Amendment rights.

The district court noted that there are two legal standards used to decide alleged First Amendment violations related to restricting speech of government employees. The first legal standard is articulated in *Pickering v. Board of Education of Township High School District 205, Will County*.ⁱⁱⁱ Under *Pickering*, the restraint of speech must strike

[A] balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest[s] of the State, as an employer, in promoting the efficiency of the public services it performs through its employees,” 391 U.S. at 568.^{iv} [emphasis added]

Thus, the employee must be commenting *on a matter of public concern as a citizen* in order for this standard to apply.

The second legal standard is articulated in the *United States v. National Treasury Employees Union (NTEU)*^v which is a standard that offers more protection to the employee regarding speech. Under NTEU, to regulate speech, the government

[M]ust make a showing that it has “real, not merely conjectural” harm and that the ban, as applied to Plaintiffs, addresses these harms in a “direct and material way.” *NTEU*, 513 U.S. at 475.^{vi} [emphasis added]

The district court then set out to determine whether it should apply *Pickering* or *NTEU*. The court first examined *Pickering* and discussed the facts of the case at hand as it pertained to that legal standard. Regarding *Pickering*, the court noted

A government employer can enact “certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public.” *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80, 125 S. Ct. 521, 160 L.Ed.2d 410 (2004). **However, the Supreme Court has also recognized that employees have a right to speak on matters of public concern.** *Id.* **Generally, such speech involves concerns regarding government policies that interest the public at large.** *Id.*^{vii}

Thus, under *Pickering*, the government employee must be speaking (1) on a matter of public concern (2) as a citizen.

The court then set out to determine if Medici and the other plaintiffs were speaking “on a matter of public concern” regarding the display of their tattoos. The court stated

The Supreme Court has provided some guidance for determining what constitutes “a matter of public concern.” For example, they have stated that “public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” *City of San Diego, Cal.*, 543 U.S. at 83–84, 125 S.Ct. 521.^{viii} [emphasis added]

The court then noted that the officer’s tattoos in the case at hand were a matter of “personal expression” on the part of the officers, rather than speech “on a matter of public concern.” Further, the officers were not acting as citizens when they sought to display their tattoos; rather, they wanted to display them while on-duty, which is a time when a government official’s speech may be subject to some restrictions.

However, for the sake of argument, the district court also analyzed the case at hand as if the officers, with their tattoos, were speaking on a matter of public concern, in order to determine if the balancing test from *Pickering* would weigh in the government’s favor, being mindful that even if the speech is a matter of public concern, the government may still restrict the speech if it is necessary to promote the efficiency of the public services it seeks to perform through its employees. The court stated

However, even if this Court were to find that the tattoos constituted citizen speech on matters of public concern, as the City has assumed for purposes of its motion to dismiss, the balance substantially weighs in favor of the City as outlined below.

Assuming Plaintiffs were citizens commenting on matters of public concern, then the test articulated in *Pickering* requires the Court to “arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest[s] of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731. **In this case, the City’s interest in maintaining a professional and uniform police force substantially outweighs Plaintiffs’ interests in personal expression through the display of their tattoos while on-duty. Police officers have the difficult responsibility of ensuring public safety and maintaining order among the populous. See *Volkman v. Ryker*, 736 F.3d 1084, 1092 (7th Cir.2013) (citing *Kokkinis v. Ivkovich*, 185 F.3d 840, 845 (7th Cir.1999)). In order to achieve these goals, the public must trust and respect the police officers charged with this difficult duty. Due to a tattoo’s unique character, if this Court allowed on-duty police officers to display their tattoos, we would undermine the CPD’s ability to maintain the public’s trust and respect, which would negatively impact the CPD’s ability to ensure safety and order.**

Tattoos, as a form of personal expression, are frequently symbolic in nature. These symbols are often displayed without the use of words, which typically convey precise thoughts and meanings. Consequently, **a tattoo’s symbolic nature allows a viewer to attribute any particular meaning to that symbol. As such, the meaning of a single symbol can be easily misinterpreted.**^{ix} [emphasis added]

Thus, because a tattoo can be misinterpreted or be subject to different meanings by different people, the court held that requiring the officers to cover their tattoos while on-duty did was permissible under the *Pickering* test. Specifically, the district court held

[T]he Court finds that an on-duty police officer's public display of any tattoo imaginable may, among other things, cause members of the public to question whether allegiance to their welfare and safety is paramount. Thus, the CPD's interest in ensuring that professionalism and uniformity is maintained, in an effort to allow the CPD to efficiently conduct its affairs, substantially outweighs Plaintiffs' interests in personal expression by way of displaying their tattoos while on-duty.^x

The court then set out to analyze the case at hand under the *NTEU* standard. The court first stated

In *NTEU*, the speech took place outside the workplace, the speech addressed matters of public concern, the speech restriction was a “wholesale deterrent to a broad category of expression by a massive number of potential speakers,” and the speech had little, if any, “adverse impact on the efficiency” of the employees' workplace. 513 U.S. at 465, 467, 115 S.Ct. 1003.^{xi} [emphasis added]

At the outset, the court noted that *NTEU* did not apply because the speech at issue (display of the tattoos on-duty) was not taking place outside of the workplace. Rather, the officers were allowed to display their tattoos while off-duty. As such, *NTEU* did not apply in this case.

The district court then granted the City's motion and dismissed the suit.

ⁱ 144 F.Supp.3d 984 (N.D. Ill. 2015)

ⁱⁱ Id. at 985-986

ⁱⁱⁱ 391 U.S. 563 (1968)

^{iv} *Medici* at 987

^v 513 U.S. 454 (1995)

^{vi} *Medici* at 987

^{vii} Id.

^{viii} Id. at 988

^{ix} Id.

^x Id. at 989

^{xi} Id.