

## First Amendment Protections to Speakers in a Public Forum

In Philip A. Bessler, et. al. v. Board of Education of West Windsor-Plainsboro Regional School District et. al. (A-81-08), \_\_\_\_N.J. \_\_\_\_ (2010), the New Jersey Supreme Court decided two questions of constitutional importance:

1. To what extent may government regulate those who wish to express their views about government at a public meeting?
2. To what extent does the interest in running an orderly meeting justify the suppression of a speaker?

In this case, the plaintiff complained at various meetings of the board of education that his daughter, a high school student, was being verbally abused by her basketball coach, and he questioned what he saw as a "double standard" in having a code of appropriate language for students using the internet but not having a similar code of conduct for coaches. At one meeting, before the meeting was opened to the public, the board president announced that each speaker had only five (5) minutes to speak. Various speakers addressed the board for longer than five (5) minutes, one for more than twelve (12) minutes, on different subjects, without interruption. Before hearing from the plaintiff, the board president announced that the purpose of the comment period was not to discuss personnel, staff behavior or litigation, and the chair reserved the right to cut-off any speaker who raised those subjects. When the plaintiff brought up the board's policy regarding "abusive language", thirty seconds into his speech, he was called out of order by the board president who refused to entertain those comments and was not allowed to complete his speech.

Plaintiff and his daughter sued the board of education, board officials and employees. He alleged that the board had violated his right of free speech guaranteed under the First Amendment in violation of his civil rights under 42 U.S.C. § 1983. After a trial, the jury entered a verdict against the Board on the plaintiff's First Amendment claims and awarded \$100,000.00 in damages for pain and suffering. The Board appealed. The "critical issue" to the Appellate Division was whether the Board's restriction in plaintiff's speech was content-based or content-neutral. "In other words, the jury had to decide whether the Board restricted Bessler's speech because of the content of what he had to say or because it was merely conducting an orderly and efficient meeting." The court found that there was sufficient evidence to sustain the jury's finding of a violation of plaintiff's First Amendment rights. It did not address the Board's appeal to reverse the damage award as excessive.

The Supreme Court granted certification. In its analysis of First Amendment protections, the Court observed that "One of the core purposes of the First Amendment is to protect speech on matters of public interest, including speech that the government finds offensive. (cits. omitted). Freedom of speech, therefore, protects not just the speech that we find agreeable, but also the speech that we hate."

While the Court acknowledged that the "right to free speech is not absolute and is subject to reasonable limitations" to restrict or curtail a speaker in a content-neutral manner who is "disruptive", or who attempts to "hijack" or "filibuster" the meeting with "irrelevant or repetitious speech", it issued this warning:

"Significantly, once a governmental entity, such as a school board, opens the floor for discussion of relevant matters of public interest and concern, it may not grant the use of a forum to people whose views it finds acceptable, but deny use of a forum to those wishing to express less favored or more controversial views."

The Court applied the standard in Monell v. the Department of Social Services, 436 U.S. 658, 98 S. Ct. .2018, 56 L. Ed. 2d. 611 (1978), making a public entity responsible for the acts of its employees or agencies who are final decision makers for the public body and concluded that the board president and the other board members were the "final policymakers for the Board of Education"; and therefore, the board was liable for his acts in silencing the plaintiff at the meeting. The Court pointed out that none of the

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other board members objected to the board president's actions, and therefore, "their silence ratified" the action to silence the plaintiff. Furthermore, as the jury had rejected the argument that the plaintiff was silenced in order to conduct an "orderly" meeting the Court determined that, there was sufficient evidence to find that the chair's comments, before Bessler was permitted to speak, "revealed impatience and antagonism toward a viewpoint he did not want to hear."

The Court affirmed that part of the Appellate Division's judgment that upheld the jury's finding that plaintiff's First Amendment rights at the meeting were violated. It reversed and remanded the Court's denial of the Board's motion for a remittitur of the damage award.

The Bessler decision emphasizes the right of free expression in a public forum. As to the competing interest which allegedly justifies the suppression of a public speaker, courts will scrutinize regulations that limit expression of speech to assure that the government is not attempting to control the content of speech.

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