



THE CLINE NEWSLETTER

Volume 8, Issue 2

June 9, 2003

FEDERAL COURT STRIKES DOWN WASHINGTON STATE LAW WHICH HAD RESTRICTED POSTING OF PERSONAL LAW ENFORCEMENT INFORMATION ON THE INTERNET

Federal District Court Judge John Coughenour has ruled unconstitutional a recently-enacted state law which had attempted to prohibit the public distribution of certain personal information pertaining to law enforcement and court personnel. The legislation, which had been enacted after a successful lobbying effort by WACOPS, took aim at an internet site managed by William Sheehan—www.justicefiles.org—which had posted the home address and social security numbers of a number of local law enforcement officers.

The statute had provided: “A person or organization shall not, with the intent to harm or intimidate, sell, trade, give, publish, distribute, or otherwise release the residential address, residential telephone number, birthdate, or social security number of any law enforcement-related, corrections officer-related, or court-related employee or volunteer, or someone with a similar name, and categorize them as such, without the express written permission of the employee or volunteer unless specifically exempted by law or court order.”

The statute had apparently included the “intent to harm or intimate” requirement because some of the information was already possessed by persons outside law enforcement circles but had not been published before the Sheehan website in a manner which tied it to particular law enforcement officers, whereas Sheehan’s purpose to harass law enforcement officers was fairly clear. But it was also this clause which had attempted to narrow the reach of the statute that the court found troublesome.

The court rejected the argument put forward by the State Attorney General on behalf of the statute that it was meant to curtail threats. The court concluded that mere harassing purpose without more does not constitute a “threat.” The

court also concluded that it violated the First Amendment to enact a statute that focused solely on a party's state of mind without any requirement that a true threat had occurred.

It is hard to see where those of us who have been trying to curtail distribution of this personal information will be able to turn next. Our firm had been involved on behalf of the Kirkland Police Guild, WACOPS and other organizations in the supporting the initial challenge to the City of Kirkland to prevent posting of the information. When that effort failed, WACOPS turned to the legislature for relief. It may be hard to improve upon this drafting which has now been struck down.

An appeal to the Ninth Circuit would normally be the next step but that may not offer much promise. The fundamental problem is that by using certain information mandatorily disclosed under the Public Disclosure Act, the full names of officers, Sheehan has been able to take that basic information and match it up with other information out in public circulation. For example, with the full name, Sheehan was able to using public assessor records to determine where officers lived.

There can also be no doubt that his fundamental aim is to harass and annoy law enforcement officers. And in so doing he is increasing the personal risk to these officers. But as the court found, Sheehan himself makes no actual threats and the courts have traditionally been very reluctant to regulate individual's state of mind unless it is accompanied by a present intention to directly harm. The statute did not take aim at prohibiting distribution of the information itself because it was already somewhat in the public domain but took aim principally at the purpose for the distribution. And in so doing it faced a first amendment challenge that it may not be able to survive.

Jim Cline

U.S SUPREME COURT HOLDS THAT FMLA DOES APPLY TO THE STATES

In a landmark opinion, the U.S. Supreme Court held that State employees may recover money damages in federal court in the event of the State's failure to comply with the FMLA's family-care provision. The FMLA, adopted in 1993, entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent. Other portions of the act permit a private right of action for equitable relief and money damages for violations of the Act

against any employer in Federal or State court. The unique, and important, question in this case though was whether State employees could bring a private action against the State for violating the FMLA in light of the 11th Amendment, which generally provides a State with immunity from suit under state or federal law by private parties, and earlier case law that enhanced this right.

The court's recent case law in this area has held that Congress cannot abrogate a State's sovereign immunity from lawsuits under its Article I Commerce Power. However, these same decisions have found that Congress can subvert state immunity "through a valid exercise of its §5 power" under the 14th Amendment in order to "enforce, by appropriate legislation," that amendment's guarantees of equal protection and due process. The test for determining whether such legislation is valid under §5, requires the legislation to exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." The court found that the FMLA was designed to "protect the right to be free from gender-based discrimination in the workplace."

After reviewing the States' records on eradicating gender and sex discrimination, the majority concluded that the "States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §5 legislation." In other words, unconstitutional discrimination of this nature was so persistent in the States that Congress was successfully able to abrogate a State's immunity from suit when enacting the FMLA under Congress' power within the 14th Amendment to ensure equal protection. As a result, there was "congruence and proportionality" between the injury to be prevented—gender discrimination—and the means adopted to end that—the FMLA.

The court distinguished this case from previous cases that found that Congress did not have the power under §5 of the 14th Amendment to impose liability on the States when enacting the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA). Under the courts equal protection doctrine, age and disability discrimination is "not judged under a heightened review standard, and passes muster if there is a 'rational basis for doing so.'" However, under the FMLA, Congress "directed its attention to state gender discrimination, which triggers a heightened level of scrutiny," thus making it "easier for Congress to show a pattern of statute constitutional violations." Also, unlike the statutes in those previous cases, the "FMLA is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest." Thus, the FMLA was found to be "congruent and proportional to its remedial object" and can be seen as "responsive to, or designed to prevent, unconstitutional behavior."

Chris Casillas

CLINE AND ASSOCIATES WEBSITE UP AND RUNNING

Cline and Associates now has a fully operating website. Visit it at www.clinelawfirm.com.

For now it provides some good basic information about our firm and upcoming training opportunities. We will also be posting back copies of the newsletter, in case you have missed any. Additionally, we soon expect to be posting some useful basic information about labor law and the rights of your members. So come back and visit it again in a week or two.

Your feedback on the website or this newsletter would be most appreciated. We want to be able to provide you the information that you will find most useful. If you have other members in your organization who are not receiving this newsletter but would like to be sure to send that list to us at clinelawfirm@clinelawfirm.com. We can arrange to send this newsletter to any or all of your members at the same great price—free.

Jim Cline

CLINE & ASSOCIATES DIRECTORY

999 Third Avenue, Suite 3800
Seattle, WA 98115
Telephone: (206) 505-5820
Facsimile: (206) 505-5821

James M. Cline (jcline@clinelawfirm.com)
William F. Barrett (wbarrett@clinelawfirm.com)
Kathleen Kremer, Of Counsel (kkremer@clinelawfirm.com)
Chris Casillas, Labor Consultant (ccasillas@clinelawfirm.com)
Paulette Pettis, Legal Assistant (paulette@clinelawfirm.com)
Janna Olerud, Administrative Assistant (janna@clinelawfirm.com)

Email concerning this newsletter or general law firm administration can be sent to clinelawfirm@clinelawfirm.com

This newsletter is a publication of the law firm of Cline and Associates. It reports on news and developments in the area of public-sector labor law. It is offered as an aid to our clients and readers and is not a substitute for legal advice. Clients are advised to request specific legal advice when addressing specific situations. Names can be added or removed from this newsletter mailing list by replying back on this email to clinelawfirm@clinelawfirm.com.