Here's your money, now shut up

The First Amendment and non-disparagement clauses with public entities – what you need to know

By Brendan Gannon

The occasional conflict that can arise between our own desire to publicly expose and shine the light on bad conduct and our clients' desire to expeditiously settle claims and move on with their lives just got a little easier to resolve. This new arrow in our quiver, a recent case out of the Fourth Circuit named *Overbey v. The Mayor and City Council of Baltimore*, is a powerful tool that plaintiffs' attorneys can use to make sure that they and their clients may speak freely and honestly about what happened after the case is settled. The case is certainly a positive advancement in the law that applies to settlements with public entities.

The *Overbey* case is not just good law, it is effective. In a recent personal-injury settlement negotiation that our firm conducted with a California public entity in July 2019, just three days after the *Overbey* decision was published, we used the *Overbey* case to argue that the public entity's non-disparagement clause was invalid, and the public entity capitulated – knowing that the reasoning of the *Overbey* case was essentially overwhelming.

The purpose of this article is threefold: (1) provide plaintiffs' attorneys with an analysis of the key facts and points of this recent and important case; (2) put forth a brief history of how federal law developed with respect to non-disparagement clauses in settlements with public entities; and (3) show how to argue and apply the *Overbey* case in order to get government entities to concede that they are not allowed to abridge your clients' First Amendment rights.

The case of *Overbey v. The Mayor and City Council of Baltimore*

On July 11th of this year, the First Amendment to the United States

Constitution was called into action by Judge Henry Floyd of the Fourth Circuit to invalidate a non-disparagement clause in Ashley Overbey's settlement with the City of Baltimore.

Ms. Overbey received a settlement in the amount of $63,000 from the City of Baltimore in response to her claim that certain members of the local police department had mistreated her after she had called 911 to report a burglary. Ms. Overbey sued, and her settlement agreement with the City of Baltimore, unsurprisingly, included a non-disparagement clause (sometimes referred to as a non-disclosure agreement or NDA). The clause in question "required Overbey to 'limit her public comments' regarding her lawsuit 'to the fact that a satisfactory settlement occurred' involving the parties." (*Overbey* (2019) 930 F.3d 215, 220.) Of course, the clause placed absolutely no limit on the City's ability to speak, and it provided that if Ms. Overbey were to ever make a public comment about what occurred, she would have to return half of the settlement amount.

During the time that the settlement was being hammered out, a large daily newspaper, the Baltimore Sun, published Overbey's name, her photograph, her address, and the amount of her settlement in a report on lawsuit payouts made by the City of Baltimore. The article also quoted the Baltimore City Solicitor as saying that Ms. Overbey had been "hostile" in her encounters with City officials. As we know very well in this digital age, the online comments section to this article rapidly filled up with invective and hate towards Ms. Overbey, who felt that she had no choice but to publicly defend herself – she fired back at her detractors and claimed that she herself had been mistreated.

The City of Baltimore, which had decided to skew public opinion against Ms. Overbey, then claimed that Ms. Overbey's public comments in her own defense amounted to violations of the non-disparagement clause in their mutual settlement agreement. Thus, the City argued, it had a right to take back half of her settlement – for her violations of the non-disparagement clause in the settlement agreement.

The Fourth Circuit invalidates the City of Baltimore's non-disparagement clause

It seemed that Ms. Overbey had made a bad move by publicly defending herself in response to the comments made by the Solicitor for the City of Baltimore… until the Fourth Circuit came along.

When considering the constitutional validity of the settlement agreement's non-disparagement clause, Judge Floyd started out by referencing the fact that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . .;" and that "[s]tanding shoulder to shoulder with the citizenry's interest in uninhibited, robust debate on public issues is this nation's cautious 'mistrust of governmental power.'" (*N.Y. Times v. Sullivan* (1964) 376 U.S. 254, 270; *Overbey* (2019) 930 F.3d 215, 224, quoting *Citizens United* (2010) 558 U.S. 310, 340.) Judge Floyd then went on to say, much to the City of Baltimore's chagrin, that public entity misconduct, "[a]s well as the circumstances in which the City litigates and settles such claims, assuredly fall in the 'public issues' category." (*Overbey* (2019) 930 F.3d 215, 224.)

Therefore, because matters of misconduct by City officials are of such importance to the public and civic discussion in an open and free society, the Fourth Circuit determined that "enforcement of the non-disparagement clause at issue here was contrary to the citizenry's First Amendment interest in limiting the government's ability to target and remove speech critical of the government from the public discourse." (*Overbey* (2019) 930 F.3d 215, 224-225.) The City of Baltimore's non-disparagement clause was thereby deemed unconstitutional, Ms. Overbey's First Amendment rights were preserved, and perhaps most importantly – she got her money back!

The history of invalidating non-disparagement clauses in settlements with public entities – The two-factor test

Assuredly, the *Overbey* case was not the first time that federal courts were required to analyze the constitutionality of non-disparagement clauses in settlement agreements with public entities. In fact, the framework for this analysis was set forth in the case of *Town of Newbury v. Rumery*, and the Supreme Court stated that courts should conduct the following analysis: (1) whether or not the settlement was entered into knowingly and voluntarily, and (2) whether or not the interest promoted by enforcement of the gag clause outweighs the attendant abridgement of First Amendment rights. (*Town of Newton v. Rumery* (1987) 480 U.S. 386, 392.)

The facts of the *Rumery* case are these: Bernard Rumery alleged officials for the Town of Newton violated his rights by defaming him and falsely accusing him. All official accusations against Rumery were dropped, but only in exchange for the waiver of his constitutional right to bring a civil action against the Town of Newton. However, because (1) Rumery voluntarily entered into the agreement to release his right to file a civil action, and (2) the facts surrounding Rumery suggested that the accusations were justified, the interest in enforcing the waiver of constitutional right outweighed Rumery's specious desire to file a civil suit.

Accordingly, this two-part analysis has been in play since 1987, and arguably beforehand, but the *Overbey v. City of Baltimore* case clarifies and expands the definition of what might constitute an improper undermining of First Amendment rights. If the allegations of police

misconduct made by Ms. Overbey related to her mistreatment were considered to be sufficiently important to invalidate the non-disparagement clause in her settlement agreement, then plaintiffs' attorneys all over California should also argue that their clients' claims concern matters of great public importance. The more convincingly you can argue that the claim concerns matters of public importance, the more likely it is that the non-disparagement clause will be declared unconstitutional.

The burden is also on the public entity to show the "close nexus" required

It is important for attorneys in California to also be advised of the fact that not only is the burden placed on the public entity to satisfy the two-factor test that was put forth in *Town of Newton v. Rumery*, the public entity must also show that there is "a close nexus – a tight fit – between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived." (*Davies v. Grossmount Union High School* (1991) 930 F.2d 1390, 1399.)

The case of *Davies v. Grossmount Union High School* constitutes a good example of a situation where the public entity failed to show that there was the sufficient nexus that is required to render a non-disparagement clause valid.

In *Davies*, plaintiff doctor Thomas Davies had initially filed a lawsuit against his local school district because his wife had been, at least according to Davies, improperly transferred to a separate school district. Doctor Davies and his school district settled the case, and they mutually entered into a settlement agreement wherein Davies forfeited his right to seek a position on the local school board. After the case was litigated and the settlement agreement was executed, Davies then sought, and won, a position on the school board. Predictably, the board then claimed that Davies had violated the settlement agreement that prevented him from seeking a seat on the local school board. However, the Ninth Circuit invalidated the provision of the settlement agreement that prevented Davies from seeking a position on the school board, stating that there was no real nexus between the litigation's underlying claims and the right surrendered by Davies. Per the Ninth Circuit:

> …the nexus between the individual right waived and the dispute that was resolved by the settlement agreement is not a close one. The underlying dispute had little connection with Dr. Davies' potential future service on the Board. Had it not been for the District's insistence on the inclusion of the waiver provision in the settlement agreement, Dr. Davies' right to run for elective office could not have been affected by a resolution of the litigation. Nevertheless, the District extracted a waiver of Dr. Davies' right ever to seek or accept a position on the Board as a condition to settling the lawsuit.

(*Davies v. Grossmount Union High School* (1991) 930 F.2d 1390, 1399.)

Thus, the clause in the contract that undermined Davies's constitutional right was rendered unenforceable.

Attorneys in California should therefore be very attentive to the analysis of whether or not there is any *real* connection between the interest that the public entity seeks to advance by making your client shut up and the particular constitutional right affected – because, there probably isn't much of a valid connection at all.

Conclusion

If the public entity that you are dealing with wants to include a non-disparagement clause in your client's settlement agreement, it is important to be aware of these recent developments in federal law, which are good for plaintiffs' attorneys. When the public entity, like the California public entity in my firm's recent case, is aware of your knowledge of the law, your knowledge of *Overbey v. City of Baltimore* and the associated cases, you are more likely to preserve and uphold your clients' First Amendment rights.


Gannon

Brendan Gannon practices in the Rains Lucia Stern St. Phalle & Silver *Personal Injury Group. Brendan is an accomplished civil litigator in a variety of areas, including premises liability, professional malpractice, auto and bicycle accidents, as well as business disputes, having successfully litigated multiple cases to settlement.*