4th Circuit: Baltimore can't buy silence from police misconduct plaintiffs

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(Reuters) - The 4th U.S. Circuit Court of Appeals faced a knotty question in Overbey v. Mayor of Baltimore: Can the government enforce a settlement provision that requires plaintiffs who sue over alleged police misconduct to remain mum about their accusations and the settlement process? In a split decision issued Thursday (2019 WL 3022327), the appeals court reversed a grant of summary judgment to the city, holding that Baltimore's non-disparagement clauses are unenforceable under the First Amendment.

"We conclude 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," wrote Judge Henry Floyd for himself and Judge Stephanie Thacker. Judge Marvin Quattlebaum, as I'll explain, dissented.

As a reporter, my knee-jerk reflex is always to root against settlements that impose secrecy, especially in cases in which plaintiffs are litigating against the enormous machinery of government. My interests generally align with those of the amici – including the Reporters Committee for Freedom of the Press, the Society of Professional Journalists and the Center for Investigative Reporting – that piled into this case in support of Ashley Overbey.

Overbey, who was represented by Crowell & Moring, is certainly a sympathetic plaintiff, at least as the 4th Circuit told her story. She was arrested in her home after calling 911 to report a burglary. The city agreed to pay $63,000 to settle her police misconduct case, but then withheld half of the money because Overbey responded to online critics who suggested that she had rigged a confrontation with the police in order to win a payout from the city.

The 4th Circuit majority concluded that the settlement agreement required Overbey to waive her First Amendment right to speak. Under First Amendment scrutiny, the court held, Baltimore's interest in enforcing the waiver was far outweighed by the public interest in robust debate of the government's use of power. "The First Amendment is meant to serve as a bulwark against such exercises of government power," the appeals court said, in quite stirring fashion.

The 4th Circuit remanded Overbey's suit seeking the unpaid portion of her settlement to the trial court, U.S. District Judge Marvin Garbis of Baltimore. It also told Judge Garbis to entertain additional briefing on whether a news website, the Baltimore Brew, has standing to seek a declaratory judgment that the city's policy of demanding non-disparagement clauses in police misconduct settlements is a violation of the First Amendment that must be enjoined going forward. The appeals court did say that in its view, the Brew had adequately alleged that Baltimore's non-disparagement clause policy was an ongoing injury to the news site's ability to report on police misconduct allegations.

Given the public's interest in learning not only about allegations of police misconduct but also in Baltimore's handling of those allegations, you may be wondering why I said the question raised in the Overbey case was a tough one. It's not, if the question is framed as a balancing test between Baltimore's interest in silencing police misconduct plaintiffs and the public's interest in hearing their stories.

But the city, represented at the 4th Circuit by Baltimore Solicitor Andre Davis, asserted an interesting argument that Overbey was actually exercising her First Amendment rights when she signed the settlement. In the view of the city – and Judge Quattlebaum, in his dissent – Overbey essentially contracted to sell her silence to the city. Baltimore, in their view, was acting to enforce its deal with her, not to squelch speech, by withholding settlement money it was not obliged to pay once Overbey violated a provision of the settlement agreement.

The crux of the city's argument, as the majority summarized it, is that Overbey "agreed to exercise her rights in a particular way in return for money; she then exercised her rights in a different way, leaving her entitled to less money," the court wrote. "Thus, in the city's view, Overbey's First Amendment rights were neither waived nor infringed."

Judge Quattlebaum's dissent pointed out that the right to speak – or not to speak – belonged to Overbey. If she had simply declined to comment on the case without signing the non-disparagement provision, he said, the public would have no claim that its interests were impaired. So according to Judge Quattlebaum, "the public's interests cannot legitimately be harmed by Overbey doing by written agreement what was her right in the first place."

The majority disposed of the city's argument by distinguishing between the First Amendment right to remain silent and Overbey's acceptance of the non-disparagement provision. The U.S. Supreme Court, according to the 4th Circuit, has interpreted the right to remain silent to be a First Amendment right not to be compelled by the government to say what you do not wish to say. That interest was not at stake in Overbey's case, the appeals court said. Baltimore did not attempt to force her to say anything, nor did the city attempt to punish her for refusing to be its mouthpiece. So, according to the majority, when she agreed to curb her voluntary speech, "she waived the First Amendment protections that would have otherwise shielded her speech from government sanction."

The majority also likened Baltimore's depiction of Overbey essentially selling her silence to hush money payments. "Needless to say, this does not work in the city's favor," the 4th Circuit said. "We have never ratified the government's purchase of a potential critic's silence merely because it would be unfair to deprive the government of the full value of its hush money. We are not eager to get into that business now."

The dissent, on the other hand, said that Overbey knowingly and voluntarily entered into a contract with the city. The courts, Judge Quattlebaum wrote, should not be in the business of rewriting that contract but should recognize Baltimore's interest in enforcing its agreements.

Baltimore Solicitor Davis said in an email statement that the city plans to request an en banc review by the 4th Circuit. "The city is disappointed that a majority of the 4th Circuit panel has sent the case back to the trial court," he said. "The city believes the dissenting judge on the panel provides the correct analysis of the case, as did the two lower court judges who earlier ruled in favor of the city."

Davis also said it will be tougher to settle police misconduct cases in Baltimore if the 4th Circuit's ruling holds up. "If this ruling stands, and word gets out somehow that 'You should not settle if the defendants insist on a non-disparagement clause,' some lawyers will find themselves in a bind as they try to negotiate settlements," he said via email.

I left a phone message for Overbey counsel Daniel Wolff of Crowell but didn't hear back.

References

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