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Civil Rights Update

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It Can't Be Politics: Seventh Circuit Offers a Timely Refresher on Political Firings

***Hanson v. LeVan*, 967 F.3d 584 (7th Cir. July 21, 2020)**

Election Day 2020 has passed, meaning a number of new officials are assuming office. All of these newly-elected officials will be faced with a fundamental question: what to do with the previous officeholder's staff?

Lawyers representing governmental entities headed by elected officials are likely familiar with their client's occasional temptation to "clean house" — particularly if the election was contentious, or the incoming official wishes to orient his or her office in a different direction. However, the Seventh Circuit recently offered a timely reminder that elected officials cannot remove most staff simply due to political or partisan views, and affirmed the limited utility of qualified immunity at the pleadings stage of such cases.

In *Hanson v. LeVan*, 967 F.3d 584, 596 (7th Cir. July 21, 2020), the Court permitted a Deputy Assessor (a rather low-level bureaucrat charged with collecting data and plugging it into prescribed formulas and programs) to proceed with her lawsuit against the newly-elected Milton Township Assessor, noting the plaintiff adequately alleged the Assessor violated her First Amendment rights. The Plaintiff alleged she and number of fellow Deputy Assessors were terminated because they supported the previous Assessor in the recent election. Stated differently, Plaintiff alleged a violation of the Supreme Court's *Elrod-Branti* rule, which holds that the First Amendment is violated when a public employee is dismissed on the basis of his or her political affiliation, *unless* party affiliation is an appropriate requirement for the position. *Id.* at 592; *see also Elrod v. Burns*, 427 U.S. 347, 372 (1976); *Branti v. Finkel*, 445 U.S. 507, 516 (1980). Party affiliation is only an appropriate condition of employment when the position puts the political dissident in a position to obstruct the implementation of policies the electorate put the winning candidate in office to pursue. *Hanson*, 967 F.3d at 592. The focus, then, is on whether the job in question entails substantial policymaking responsibility, discretion in carrying out the elected official's policy goals, or the need to maintain confidentiality (such as a speech writer) about the official's political discussions. *Bogart v. Vermilion Cty.*, 909 F.3d 210, 213-14 (7th Cir. 2018).

To prove a job does or does not entail the sort of responsibilities that would make political beliefs and associations a relevant criteria, the court will usually defer to "reliable" job descriptions, and (if applicable) a statute or ordinance that lays out the position's responsibilities. *Hanson*, 967 F.3d at 593. If neither the job description nor the ordinance/statute clearly define a position's responsibilities, then the Court will turn to how the position is carried out "on the ground" by the employee—opening the door for the employee's allegations and testimony to dictate the analysis. *Id.*

Hansen demonstrates the potential pitfalls in moving to dismiss a First Amendment claim in the partisan-firing context. A motion to dismiss focuses only on the pleadings, and a job description is unlikely to be attached to a complaint in this context. As such, the defendant-official typically has only two main pleadings-focused arguments on the First Amendment question: (1) to argue some statute or ordinance clearly establishes the job in question entails political discretion/judgment—

a relatively rare species of law; or (2) to argue the law did not clearly establish the position in question was protected by the First Amendment. The *Hansen* court reiterated how weak the second argument is at the pleadings stage, noting the qualified immunity analysis is broad when determining whether to dismiss a complaint. *Id.* at 597. Thus, the question was not whether it was clearly established that a *deputy assessor* at the Milton Township Assessor's Office had a political component to their job, but, instead, whether it was clearly established that a *low-rung position that entailed no political judgment* was protected from a political termination. *Id.* at 597–98. The latter, more-generic proposition has existed since the *Elrod-Branti* line of cases themselves, and therefore the Court easily found that the complaint should not be dismissed on qualified grounds.

In summary, in the post-election rush, lawyers representing elected officials should be mindful of the First Amendment risks associated with terminating employees in mid- and low-level positions. If a terminated employee files suit, the Seventh Circuit's recent *Hansen* decision shows such lawsuits are ill-suited to quick dismissal.

About the Author

Bryan J. Vayr is an Associate at *Heyl, Royster, Voelker & Allen, P.C.*, in Champaign, where he focuses his practice on civil litigation, with a focus on complex civil rights, governmental defense, and professional liability. Much of his practice entails defending government, law enforcement, and educational institutions in cases alleging violations of civil rights in state and federal court. Mr. Vayr also represents counties and municipalities in tort litigation and contract disputes, including employment, infrastructure, and construction disputes. Mr. Vayr joined Heyl Royster in 2017 after receiving his J.D., *summa cum laude*, Order of the Coif, from the University of Illinois College of Law and B.S., *magna cum laude*, from the University of Illinois-Springfield. While in law school, Mr. Vayr was Managing Articles Editor for the *University of Illinois Law Review*, and was recognized by the Clinical Legal Education Association for his work in the College's Civil Litigation Clinic. Prior to joining Heyl Royster, Mr. Vayr worked at the Champaign County States Attorney's Office, a Chicago-based firm specializing in complex litigation, and the Land of Lincoln Legal Assistance Foundation.

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