Conduct Unbecoming

Sex, Videotapes, the Internet and Police Misconduct

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Law enforcement personnel are held to personal standards higher than other members of our communities. Conduct unbecoming has been a common and historical charge used in controlling and censuring police officers and other public employees, for both on and off duty actions. The “Police Officer’s Code of Ethics,” written back in the 1950s, has a provision that is routinely referenced in training as well as court decisions that promises, under oath: “I will keep my personal life unsullied as an example to all.” Court decisions regarding public employee misconduct involving conduct unbecoming commonly requires that the act of misconduct have a nexus or connection to the employee’s job performance or ability to perform or have an adverse affect on the agency’s “morale,” “operations,” or “efficiency.” Historically, law enforcement employees have been held to this higher standard of conduct, both on and off the job. This heightened standard of conduct also applies to other public employees. Employees of private entities however, are rarely held to this heightened standard of conduct, specifically when the conduct at issue occurred outside work hours.

While public agencies have the ability to restrict some off-duty conduct, the agency cannot abuse this authority and must articulate a reasonable rationale for its determination that the conduct of the employee adversely affected the employee’s ability to perform or impacted his or her fitness for public employment. The agency must establish how the conduct of the employee affected the operation, efficiency and/or morale of the agency. These are the important and significant hurdles or hoops stemming from the many court decisions involving “conduct unbecoming an employee” that an agency must jump over or through when imposing discipline.

A recent case exemplifies these concepts. Beecham v. Henderson County [i] involved an office romance issue. The Plaintiff, who was a deputy clerk for the Circuit Court and an at will employee,
became involved in an intimate relationship including engagement with a local practicing attorney. The county terminated the plaintiff for engaging in an “adulterous affair.” The District Court granted the County’s Motion to Dismiss. The Appeals Court, however, affirmed the District Court’s dismissal for other reasons. The attorney was still married to his wife although separated from her. His wife was employed as a Clerk and Master in another court on the same floor of the courthouse as the Plaintiff. What is not in the case summary is whether the Plaintiff was ever advised of the workplace problems her relationship was causing and given some opportunity to resolve the issue (this would have been a reasonable supervisory approach before initiating discipline). The appeals court found that the “Plaintiff’s claim cannot prevail upon the application of rational- basis review to the employment action taken by her employer... Henderson County Courthouse officials, deciding that it was unacceptably disruptive to the workplace for a woman employed in the office on one of the county’s courts to be openly and ‘deeply involved in a romantic relationship’ with a man still married to a woman employed in the other county court down the hall, acted upon a ‘plausible policy reason’... A rational basis for the decision is therefore evident.”

It’s important to include a definition of conduct unbecoming in your manual, employee handbook, or other document provided to or accessible to all employees. A court accepted definition that covers all of the essential points is “Conduct unbecoming is any conduct which adversely affects the morale, operations, or efficiency of the department or any conduct which has a tendency to adversely affect, lower, or destroy public respect and confidence in the department, or any officer or employee. Conduct unbecoming also includes any conduct which brings the department or any officer or employee into disrepute or brings discredit upon the department, or any officer or employee. Officers and employees shall conduct themselves at all times, both on and off duty, in such a manner so as to reflect most favorably upon the department.”

A new trend in this area of conduct unbecoming an officer involves sex and the internet. There have been numerous cases over the past decade involving police employees engaging in sexual activities with connections to the Internet and involve videotaping these activities. When these off-duty activities are exposed to the agency and/or public, a reasonable public agency must investigate the circumstances to determine whether intervention and/or discipline is warranted.

A case in point [ii] involved three deputies and their wives engaging in explicit group sex porno tapes which were offered for sale on the internet from a site sponsored by one of the wives. The conduct was brought to the attention of the Sheriff’s Office by an anonymous caller. The deputies attempted to have their faces obscured, but this was not always effective. What is particularly interesting in this case was the apparent conflict between the original IA investigator, her supervisors, the hearing panel, Florida POST and the Sheriff as to whether the conduct was a violation of the agency’s standards and it’s reliance on the Code of Ethics. Also disputed was whether the deputies violated the agency’s rule of obtaining prior approval for off-duty work. The Sheriff was adamant on all grounds that these acts were misconduct and his position was supported by the Federal District Court and the United States Court of Appeal for the 11th Circuit.

The Court reported, “Additionally, the PBCSO required its employees to adhere to its adopted Code of Ethics, which mandated that employees must keep their private lives “unsullied as an example to all.” The obvious purpose of the prior-approval regulation was to prevent damage to public confidence in the PBCSO by employees' off-duty employment, and the ethical rule similarly required employees to conduct their private or off-duty lives so as not to place the PBCSO in disregard... Although "[a]
government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment," nonetheless "a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public."

The United States Supreme Court has also rendered a decision in a similar case involving a San Diego police officer [iii]. The officer was selling videotapes of himself masturbating in a police uniform on EBay; however, the uniform did not have the markings of the San Diego Police Department. These types of products are restricted to a separate site of EBay. Apparently, another member of the Police Department observed and recognized the officer. The Police Department terminated the officer, but the disciplinary action was overturned by the 9th Circuit, citing First Amendment protections of the officer. This was subsequently reversed by the U.S. Supreme Court.

Another recent case established that even federal law enforcement agencies are not immune to this type of conduct. [iv] The case involved FBI agent who was videotaping himself and three females, two were employees of the FBI, engaging in sex. One of the incidents was filmed with the consent of the female partner, but others involving her were not consensual. "The agency in this case argued that the appellant’s conduct was so egregious that nexus [or connection with his employment] must be presumed, and that, even if such a presumption does not arise in this case, nexus nevertheless has been shown by preponderant evidence. We need not consider the first of these two arguments. Even if nexus may not be presumed in this case, we find that the agency has shown, by preponderant evidence, a nexus [or connection] between the appellant’s conduct and the efficiency of the service...

In the absence of the kind of presumed nexus mentioned above, an agency may establish nexus by showing that the employee's conduct (1) affected the employee’s or his coworkers’ job performance, (2) affected management’s trust and confidence in the employee’s job performance, or (3) interfered with or adversely affected the agency’s mission... The record shows that the appellant’s failure to live up to these standards caused the ASAIC and others in the agency to lose confidence in the appellant’s honesty and integrity, to question his judgment, and to have “much less confidence in his abilities to perform... any job... It also shows that the two FBI employees the appellant taped became aware of the videotapes, that information and rumors regarding the taping spread throughout the division, that the information and rumors were upsetting to both of the employees, that it interfered with their ability to concentrate on their work, and that the ASAIC accordingly needed to spend time counseling them and making sure that they and other employees concentrated on their work rather than on the gossip and rumors related to the videotaping.”

Another case provides an example of the significance of the “Code of Ethics” or other such value statement on law enforcement employee conduct. [v] This case involved an officer who had been involved in two domestic incidents. One of these domestic incidents occurred in 1998 while the other had occurred in 2002. The officer had been a police officer since 1989 and was hired by his current agency in 1996. When he joined the second agency he signed an “oath of office” which consisted of the Police Officers Code of Ethics and Canon of Ethics, as well. In 2003, the officer was involved in an altercation with a sergeant who had been his personal friend for the past 18 years. The sergeant informed the agency of the prior domestic violence incidents. The officer was charged with both incidents. The first was beyond the 3 year statute of limitations. However, the State contended that the officer was bound by a state statute which extended the limit to 10 years for “public officers.” The court found that a police officer was “considered on duty 24 hours a day.” Since it was concluded that the officer was “on-duty 24 hours a day, the “public official” extension of the statute of limitations
applied to officers who were off-duty at the time of the incident giving rise to the discipline. What the court found specifically important was that the officer signed these oaths and codes. What is not necessarily answered is whether signature is essential. Would the fact that these were used in some form of swearing in ceremony or were embodied in a manual which the officer acknowledged receiving be sufficient?

Unfortunately, these are not isolated examples of conduct being engaged in by law enforcement and other public employees. These cases and police practices do not direct nor encourage public agencies to intrude into the personal lives of public employees. But when these types of incidents do come to the attention of the agency and the conduct has a potential affect on the employee’s performance or the operation of the agency, they should be investigated. Agencies are now accessing personal websites, such a MySpace.com, when undertaking background investigations of applicants. This has revealed some conduct that can reasonably be foreseen to predict subsequent behavior on the part of the potential employee. The outcome of the investigation will determine what, if anything, should be done by the agency.

Action steps:

1. Include the “Police Officer’s Code of Ethics” or similar agency value/conduct statement in your agency’s written manual, personnel handbook, employee orientation training, and, if done, any hiring ceremony.
2. Have each employee sign acknowledgment of receipt and understanding of these standards of conduct.
3. Include these concepts during basic, in-service and supervisory training.
4. When your investigation concerning allegations of this type is sustained, ensure that the charges are fully described to include the “nexus” of the act of misconduct with the employee’s ability to perform and, if warranted, how that act of misconduct has the potential to adversely affect the morale, operations or efficiency of your agency.

CITATIONS:

ii. Thaeter v. Palm Beach County Sheriff’s Office, et al., 449 F.3d 1342 (11th Cir. 2006).