

Washington Court Deems Posting of IME Videos on Social Media Free Speech

What Happened

In *Ten Injured Workers v. State of Washington, et al.* (Ten Workers), the Washington Court of Appeals recently overturned a provision of RCW 51.36.070, which prohibited injured workers from posting video recordings of their Independent Medical Examinations (IMEs) on social media. This decision arose from a lawsuit filed by ten injured workers against the State of Washington, the Director of the Department of Labor and Industries (L&I), and the State Attorney General. The plaintiffs challenged the constitutionality of the statute under the Uniform Declaratory Act, Chapter 7.24 RCW.

Background

In 2023, RCW 51.36.070 was amended to allow injured workers to record their IMEs. However, subsection (4)(G) of this statute specifically banned the posting of these recordings on social media platforms. The state defended this subsection as a regulation of the time, place, and manner of speech, arguing that it was necessary to maintain the integrity of the IME process and protect privacy.

Court's Decision

The Court of Appeals ruled that the restriction imposed by RCW 51.36.070(4)(G) constituted impermissible prior restraint on free speech, violating the First Amendment. The court's analysis focused on whether the prohibition on posting IME videos to social media could be justified under the permissible constraints on speech. It concluded that:

Social Media as The Town Square

Relying heavily on the analysis of the Internet as a public forum from the 2017 U.S. Supreme Court decision in *Packingham v. North Carolina*, the court concluded: "Allowing workers to record their IMEs neutralizes the power imbalance between injured workers and doctors, provides workers with a mechanism of disputing diagnoses or care they may not agree with, and incentivizes providers to offer quality care." The court affirmed the role of social media as a contemporary public space where individuals freely exchange ideas and experiences, relating the Internet to a traditional town square.

First Amendment Protection

The court found that posting IME videos on social media is a form of expressive conduct. Such postings convey messages and invite public engagement, fitting within the scope of protected speech. The purpose behind posting an IME video—whether to inform, engage, or provoke discussion—reflects the individual's intent to convey a specific message. Consequently, the court found that such postings are protected under the First Amendment as they fall within the realm of expressive conduct.

Prior Restraint

The court determined that the statute's prohibition amounted to prior restraint because it preemptively limited workers' ability to share their experiences online. Prior restraints on speech are heavily scrutinized and generally deemed unconstitutional unless they serve a compelling government interest and are narrowly construed. The court rejected the state's contention that the



William H. Walsh

Member

wwalsh@cozen.com
Phone: (206) 224-1296
Fax: (206) 621-8783

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prohibition was a valid manner restriction because "it forecloses virtually all access to sharing a recorded IME."

Precedents Referenced

***United States v. O'Brien*, 391 U.S. 367 (1968)**

The court referenced this case to assess whether the act of posting IME videos could be considered expressive conduct. The ruling found that such posts are intended to convey specific messages and are understood by their audience, qualifying them as protected speech.

***Packingham v. North Carolina*, 582 U.S. 98 (2017)**

The court cited this case to underscore the importance of social media as a platform for free expression, reinforcing that restrictions on access to social media infringe upon constitutional rights. In *Packingham*, the court held that a law prohibiting sex offenders from accessing social media sites that they reasonably knew would be accessed by children was an improper prior restraint of free speech.

***Rumsfeld v. Forum for Acad. & Institutional Rights, Inc. (FAIR)*, 547 U.S. 47 (2006)**

This case involved a challenge to a law requiring colleges to provide military recruiters access to campuses. The state relied on this case in *Ten Workers* to argue that posting an IME to social was not free speech (similar to the plaintiffs' actions attempting to deny recruiters access was deemed not to be free speech in FAIR). The court in *Ten Workers* distinguished FAIR on the grounds that posting IMEs on the Internet was inherently expressive.

Implications

In *Ten Workers*, the Washington Court of Appeals took the opportunity to make a statement about the scope of free expression rights on the Internet. The decision affirms that social media serves as a vital medium for personal expression and public discourse, and the court seemed particularly persuaded by the view that the right to access social media was a means of leveling the playfield between institutions or procedures that might otherwise involve an imbalance of power. Left unaddressed were other more practical issues, such as the privacy implications for physicians or others involved in the recording who might not consent to having their image or likeness displayed on social media. It may turn out that the ruling impacts the willingness of providers to participate in the L&I IME process absent an express waiver of the right afforded by *Ten Workers*. Also, while the right to post these recordings may be protected from government action under the First Amendment, those who post the videos still face the risk of defamation claims in circumstances where providers feel it necessary to protect their reputations. As such, the practical effect of this ruling remains to be seen.
