

Sixth Circuit Dismisses Journalist's Claims of Interference in Newsgathering

Memphis Changed Policy After Complaint Was Filed

By Christopher Proczko

On April 30, 2021, the U.S. Court of Appeals for the Sixth Circuit affirmed the dismissal of journalist Wendi Thomas's suit seeking injunctive and declaratory relief against the City of Memphis, Tennessee, for excluding her from the city's Media Advisory list in retaliation for unfavorable coverage of the mayor. The court agreed with the district court that the City's change to its media relations policy after the suit was filed mooted the action. [Thomas v. City of Memphis](#).

Background

Wendi Thomas, a well-known media figure in Memphis's journalism community, is the founder, editor, and publisher of *MLK50: Justice Through Journalism*, a news website that focuses on issues at "the intersection of poverty, power, and public policy." In that capacity, Thomas often reports on the local government, including Memphis Mayor Jim Strickland.

The City of Memphis maintained an email listserv to keep media members informed of newsworthy events and activities—what it called the Media Advisory List. According to Thomas's complaint, the City removed her email address from the Media Advisory List sometime after January 22, 2018 without telling her. Thomas learned that she had been removed from the Media Advisory List when another journalist forwarded her an email that the City had sent to the listserv. Thomas repeatedly requested that the City add her back onto the Media Advisory List over the course of several months, but she received no response. Thomas believed that her removal and subsequent exclusion from the List was retribution, motivated by the City government's disapproval of her coverage.

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On May 13, 2020, Thomas sued under 42 U.S.C. § 1983, asserting claims that the City of Memphis, Mayor Strickland, and the Chief Communications Officer had violated the First, Fifth, and Fourteenth Amendments to the Constitution, as well as Section 19 of the Tennessee Constitution. She alleged that her exclusion from the Media Advisory List substantially disrupted her ability to gather news and report on the City of Memphis and the mayor, specifically the city government's response to the COVID-19 crisis. As an example, Thomas stated that being left off the Media Advisory List prevented her from receiving login information to daily virtual press conferences hosted by the Joint Task Force via Zoom so that she could attend and ask questions.

On May 26, 2020, just thirteen days after Thomas filed suit, the City of Memphis adopted a new media relations policy—PM-62-28—that required “all media advisories [to] be made publicly available on the City’s website and on various other social media platforms.” Effective as of that date, media advisories from the mayor’s communications office regarding news briefings, news conferences, and written statements “will be posted on the City of Memphis website” and official City of Memphis social media feeds.

The district court dismissed Thomas’s claims against the City as moot because the City had voluntarily ceased the allegedly violative conduct. The claims against the Mayor and the Chief Communications Officer were dismissed on other grounds. Thomas appealed the district court’s ruling that her claims against the City of Memphis were moot.

Court Decision

On April 30, 2021, a panel of the Sixth Circuit Court of Appeals unanimously affirmed the district court’s dismissal of Thomas’s claims against the City. The sole issue that the court analyzed was whether Thomas’s claims were moot after the City voluntarily stopped using the Media Advisory List. The City was not entitled to a presumption of mootness because its new media relations policy was a regulatory change implemented by the Mayor’s office rather than the product of actual legislation. As a result, the court had to resolve two issues: (1) whether the City implemented the new media relations policy pursuant to a “legislative-like” procedure (which would increase the likelihood that Thomas’s claims are moot) or an “ad hoc” procedure (which would decrease the likelihood of mootness); and (2) whether the City has demonstrated that the challenged practice is not likely to recur.

First, the court decided that the city’s policy change was made pursuant to a legislative-like procedure. Even though the change bore none of the standard marks of legislation like elected officials casting a vote or notice-and-comment rulemaking, the City offered sworn testimony from its Chief Legal Officer that the City was *required* to get formal written approval for the policy change from two high-ranking City officers—the Chief Legal Officer herself and the Chief HR Officer—and that the City “will not” use the Media Advisory List or any other media listserv. Despite the suspicious timing of the City’s policy change, the court determined that the Chief Legal Officer’s sworn declaration established that the City underwent a formal, organized process to institute its new media relations policy. The court decided the circumstances surrounding this deliberation was more than an “ad hoc” process and deserved “legislative-like” deference.

Second, giving the City the benefit of its “legislative-like” policy change, the court found that the City had demonstrated that the challenged activity is not likely to recur. The Chief Legal Officer’s sworn declaration was enough to convince the court that the City is not likely to revive its Media Advisory List, and nothing in the record supported the notion that the City’s change in policy was a sham. Ultimately, the theoretical possibility that the City would revive its allegedly unconstitutional policy was speculation, and Thomas’s mere speculation that it would was not enough to maintain an ongoing case or controversy.

Finally, the court determined that the City had demonstrated that its policy change completely and irrevocably eradicated the effects of the challenged conduct. Thomas's complaint sought only declaratory and injunctive relief; she had not made a claim for damages or other relief from any injuries arising from the lost newsgathering opportunities or any alleged injuries that might persist after the City changed its policies. An injunction or declaration concerning the City's actions under a policy that was no longer in effect and had no likelihood of being revived would be an advisory opinion. Lacking any indication that the City intended or was likely to return to the allegedly unconstitutional practices, the court determined that Thomas's claims were moot.

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