



August 2, 2024

Commissioner Sarah Strommen
Minnesota Department of Natural Resources
500 Lafayette Road
Saint Paul, Minnesota 55155

Sent via U.S. Mail and Electronic Mail (commissioner.dnr@state.mn.us)

Dear Commissioner Strommen:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, is concerned by the Minnesota Department of Natural Resources' apparent investigation into employee Tyler Janke's Facebook post following the attempted assassination of former President Donald Trump.¹ While the post may have caused offense, it is protected by the First Amendment, which affords government employees robust rights to comment as private citizens on matters of public concern. FIRE calls on the DNR to refrain from investigating or disciplining Janke for the post.

Shortly after a gunman opened fire while former President Trump spoke at a rally near Butler, Pennsylvania, on July 13, injuring him and two attendees and killing another, DNR Program Consultant Tyler Janke posted to his personal Facebook page while off duty the following message: "Too bad they weren't a better shot."² The post came to the attention of the DNR, which issued the following statement on July 16:

Violence or the threat of violence has absolutely no place in American politics. The recent assassination attempt on former President Trump was a heinous act with tragic consequences. The Minnesota Department of Natural Resources vehemently rejects the use of violence, or the insinuation of violence, in any form.

We are aware of a recent social media post on a personal account associated with one of our employees about the assassination

¹ The narrative in this letter represents our understanding of the pertinent facts based on public reporting, but we appreciate that you may have additional information to offer and invite you to share it with us. We do not currently represent Janke but write to you in our capacity as advocates for free expression.

² *Minnesota DNR responds to social media post from employee regarding Trump shooting*, KAALTV (July 16, 2024), <https://www.kaaltv.com/news/minnesota-dnr-responds-to-social-media-post-from-employee-regarding-trump-shooting>.

attempt on former President Trump. The comment is reprehensible and inconsistent with the views and values of the Minnesota DNR. **We are thoroughly examining the matter and will take all appropriate steps in alignment with state law and policy.**³

Although the DNR has authority to regulate its employees' speech when they speak pursuant to job duties,⁴ any investigation or discipline of Janke for his Facebook post for the reasons the DNR cited would violate his First Amendment rights.

Government employees retain a robust First Amendment right to speak as private citizens on matters of public concern.⁵ A government employer may discipline employees for such speech only when its interest "in promoting the efficiency of the public services it performs through its employees" outweighs "the interests of the [employee], as a citizen, in commenting upon matters of public concern."⁶ For employee discipline or termination to satisfy this balancing test, the public employer "must, with specificity, demonstrate the speech at issue created workplace disharmony, impeded the [employee's] performance or impaired working relationships. Mere allegations the speech disrupted the workplace or affected morale, without evidentiary support, are insufficient."⁷ Government employers may not impose discipline merely because they disapprove of the content or viewpoint of an employee's expression.⁸

The Supreme Court has long held that free speech principles protect expression others may deem offensive, uncivil, or even hateful.⁹ This includes expressing vitriol about public figures and engaging in rhetorical hyperbole that may reference violence.¹⁰ In fact, the Supreme Court has made that clear in a context similar to that in which Janke spoke. In *Rankin v. McPherson*, a police department fired one of its employees who, after hearing that President Reagan had been shot, expressed contempt for his welfare policies by stating: "If they go for him again, I hope they get him."¹¹ The Court held the employee's firing unconstitutional, noting that whether listeners found her statement to be of "inappropriate or controversial character" was

³ Minn. Dep't of Nat. Res., FACEBOOK (July 16, 2024, 12:46 PM CT) <https://www.facebook.com/MinnesotaDNR/posts/pfbid02q7pjLnAtuiL3CFv4eLEb9ceBagEtTic3PC8uML8VvTQbJ1b16U9TZtswtrJCYgUvl> (emphasis added).

⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁵ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

⁶ *Id.*

⁷ *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007).

⁸ *Rankin v. McPherson*, 483 U.S. 378, 384 (1987) ("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").

⁹ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (fears that "muttering" and "grumbling" white onlookers might resort to violence did not justify dispersal of civil rights marchers); *Cohen v. California*, 403 U.S. 15, 25 (1971); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

¹⁰ *Watts v. United States*, 394 U.S. 705, 708 (1969) (draftee's statement that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J." was First Amendment-protected rhetorical hyperbole).

¹¹ 483 U.S. at 381.

“irrelevant” to its constitutional protection.¹² This type of harsh criticism is “core political speech,” where free speech protection is “at its zenith.”¹³

Janke’s comment was no different than the police employee’s in *Rankin*. There is no question he spoke in his capacity as a private citizen when he made the Facebook post. He did not speak on behalf of the DNR or post the content as part of his job duties. It is equally clear the post addressed a matter of public concern: the attempted assassination of a former president and current presidential candidate.¹⁴ The DNR therefore cannot punish Janke for his personal social media activity without providing evidence of workplace disruption substantial enough to outweigh his strong interest in commenting on matters of public significance. In fact, a “stronger showing” of disruption is “necessary if the employee’s speech more substantially involved matters of public concern,”¹⁵ as Janke’s did here.

The DNR’s publicly stated basis for “thoroughly examining the matter” is simply a judgment that Janke’s comment was “reprehensible and inconsistent with the views and values of the Minnesota DNR.” Neither that expressed interest, nor a desire to placate fleeting public anger, are permissible reasons to investigate or discipline an employee for his speech. There is no indication that Janke’s post impaired his job performance or significantly disrupted the DNR’s ability to provide public services. The DNR must not “use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees’ speech.”¹⁶

Importantly, an investigation of constitutionally protected speech can itself violate the First Amendment, even if it concludes in favor of the speaker. The question is not whether a government employer metes out formal punishment, but whether its actions in response to the speech “would chill a person of ordinary firmness from continuing in the protected activity.”¹⁷ Investigations into protected expression may meet this standard.¹⁸ The DNR is free to publicly condemn Janke’s post and make clear his views do not reflect those of the department. But its public condemnation of Janke’s speech, coupled with its announcement that it is “thoroughly examining the matter and will take all appropriate steps,” carry an implicit threat of discipline that may deter Janke and other DNR employees from exercising their First Amendment rights.

¹² *Id.* at 387.

¹³ *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414 (1988)).

¹⁴ See *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (“Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”) (cleaned up).

¹⁵ *Connick v. Myers*, 461 U.S. 138, 152 (1983).

¹⁶ *Rankin*, 483 U.S. at 384.

¹⁷ *Williams v. City of Carl Junction*, 480 F.3d 871, 878 (8th Cir. 2007).

¹⁸ See, e.g., *White v. Lee*, 227 F.3d 1214, 1228-29 (9th Cir. 2000); *Levin v. Harleston*, 966 F.2d 85, 89-90 (2d Cir. 1992).

Retaliating against Janke for his constitutionally protected speech would invite litigation and potentially damages from which DNR officials will not be able to claim qualified immunity—particularly given the existence of on-point Supreme Court precedent.¹⁹ FIRE thus calls on the DNR to cease any investigation of Janke’s constitutionally protected speech and affirm the department’s commitment to its First Amendment obligations.

We respectfully request a response by August 16, 2024.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Terr', written in a cursive style.

Aaron Terr
Director of Public Advocacy

¹⁹ See *Dreith v. City of St. Louis*, 55 F.4th 1145, 1148 (8th Cir. 2022) (government officials are not entitled to qualified immunity—and therefore may be held personally liable—for violations of “clearly established” constitutional rights).