

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Entercom Buffalo) File No. EB-00-IH-0221
License, LLC)
) Facility ID # 56101
Licensee of Station WGR(AM),)
Buffalo, New York)

ORDER

Adopted: June 27, 2002

Released: June 28, 2002

By the Chief, Enforcement Bureau:

1. In this Order, we deny Complainant Michael P. Palko's petition for reconsideration of the Enforcement Bureau staff's dismissal of a complaint in which Mr. Palko alleged that Entercom Buffalo License, L.L.C. ("Entercom"), licensee of WGR(AM), Buffalo, New York ("WGR") broadcast indecent material.

BACKGROUND

2. On May 8, 2000, Mr. Palko filed a complaint in which he alleged that station WGR had broadcast indecent material in two instances. Mr. Palko alleged that WGR's morning program co-hosts, in conjunction with the station's distribution of urinal splash guards decorated with emblems of National Hockey League ("NHL") teams to local bars and restaurants, repeatedly stated that they wanted to "piss on" teams, players and the Commissioner of the NHL. Mr. Palko also alleged that the hosts would invite listeners to call the station to talk about who in the NHL they would "piss on." Although Mr. Palko failed to provide the time during which these allegedly indecent remarks were made, he did state that these statements continued as late as 9:45 a.m. on May 8, 2000. In the second instance, Mr. Palko alleged that WGR broadcast additional indecent material on May 8, 2000 when one of the hosts, in response to a listener's question as to whether the listener could say a specific phrase on the air, told the listener: "you can say prick on the air, you can even call someone a sawed-off little prick on the air." Mr. Palko claimed that the host "used the word a few more times for effect."

3. By letter dated February 23, 2001, the Enforcement Bureau's Investigations and Hearings Division ("IHD") dismissed Mr. Palko's complaint, finding that WGR did not broadcast descriptions of sexual or excretory activities or organs in a patently offensive manner. On March 13, 2001, Mr. Palko sent a letter asking IHD to review the decision not to take enforcement action and requesting that this letter be treated as a petition for reconsideration.¹ IHD then sent an inquiry letter to Entercom directing it to

¹ Mr. Palko stated: "I formally ask that you revisit my original complaint and issue a warning to WRG

provide information about whether WGR broadcast the aforementioned material. It also directed Entercom to provide a recording of the alleged broadcast, if one existed. Entercom responded by letter dated June 26, 2001. On November 16, 2001, IHD sent Mr. Palko a copy of Entercom’s response and provided him with an opportunity to comment further. Mr. Palko responded by letter dated December 11, 2001. After reviewing the entire record in this matter, we conclude that there is not sufficient information to demonstrate that Entercom broadcast apparently indecent material as alleged.

DISCUSSION

4. It is a violation of federal law to broadcast obscene or indecent programming. Specifically, Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464. In doing so, the Commission may, among other things, impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Communications Act (the “Act”), 47 U.S.C. § 503(b)(1), for broadcast of indecent material in violation of 18 U.S.C. § 1464. Federal courts have upheld Congress’s authority to regulate obscene speech and, to a limited extent, indecent speech. Specifically, the U.S. Supreme Court has determined that obscene speech is not entitled to First Amendment protection. Accordingly, Congress may prohibit the broadcast of obscene speech at any time.² In contrast, federal courts have held that indecent speech is protected by the First Amendment.³ Nonetheless, the federal courts consistently have upheld Congress’s authority to regulate the broadcast of indecent speech, as well as the Commission’s interpretation and implementation of the statute.⁴ However, the First Amendment is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.⁵ Consistent with a subsequent statute and case law,⁶ under the Commission’s rules, no radio or television licensee shall broadcast obscene material at any time, or broadcast indecent material during the period 6 a.m. through 10 p.m.⁷

radio or impose a monetary forfeiture.”

² See *Miller v. California*, 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881 (1973); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

³ See *Sable Communications of California, Inc. v. FCC*, 492 U.S. at 126.

⁴ See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (“ACT I”); *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) (“ACT II”); *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) (“ACT III”).

⁵ See *ACT I*, 852 F.2d at 1344 (“Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear.”). See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

⁶ Public Telecommunications Act of 1992, Pub. L. No. 356, 102nd Cong., 2nd Sess. (1992); *ACT III*.

⁷ See 47 C.F.R. § 73.3999.

5. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual organs or activities. Second, the broadcast must be “patently offensive as measured by contemporary community standards for the broadcast medium.”⁸ This definition has been specifically upheld by the federal courts.⁹ The Commission’s authority to restrict the broadcast of indecent material extends to times when there is a reasonable risk that children may be in the audience.¹⁰ As noted above, current law holds that such times begin at 6 a.m. and conclude at 10 p.m.¹¹

6. The Commission’s indecency enforcement is based on complaints from the public. Once a complaint is before the Commission, we evaluate the facts of the particular case and apply the standards developed through Commission case law and upheld by the courts.¹² “Given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming.”¹³ In evaluating the record to determine whether the complained of material is patently offensive, three factors are particularly relevant: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock.¹⁴ As discussed below, we find that Entercom did not broadcast indecent material in violation of the Commission’s Rules.

7. We first decline to find that Entercom broadcast indecent material in violation of the Commission’s rules when WGR allegedly broadcast the word “prick.” According to Mr. Palko’s complaint, the hosts were responding to a listener’s questions as to what could be said on the radio. Specifically, the hosts told the listener that “you can say prick on the air, you can even call someone a sawed-off little prick on the air.” In this context, the word “prick” was not used “to describe or depict” a sexual activity or organ, but was instead used as a vulgar insult. As the Commission previously stated, the use of a

⁸ *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)).

⁹ In *FCC v. Pacifica Foundation*, the Supreme Court quoted the Commission’s definition of indecency with apparent approval. *FCC v. Pacifica Foundation*, 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *See ACT I*, 852 F.2d at 1339; *ACT II*, 932 F.2d at 1508; *ACT III*, 58 F.3d at 657.

¹⁰ *See ACT I*.

¹¹ *See ACT III*.

¹² *See Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8015, para. 24 (2001).

¹³ *Id.*

¹⁴ *Id.*, 16 FCC Rcd at 8003, para. 10.

specific word, in and of itself, is not sufficient to demonstrate that a station has aired indecent material.¹⁵ We therefore decline to find that Entercom's broadcast of the word "prick" in this circumstance violated the Commission's rules.

8. Mr. Palko also alleged that the WGR hosts regularly stated that they wanted to "piss on" numerous individuals and that they invited listeners to call in and declare whom they would most like to "piss on." In the complaint, Mr. Palko claimed that the hosts "regularly talk about who they would 'piss on' and callers were invited to call in to talk about who in the NHL they would 'piss on.'" He also asserted that the hosts regularly discuss "pissing on" the NHL Commissioner and that this continued as late as May 8, 2000. In his December 11, 2001 letter, Mr. Palko reiterated this allegation and stated that the hosts "were discussing specifically of urinating on individuals" and pointed to the station's distribution of urinal splash guards as proof of this allegation.

9. Entercom disputes Mr. Palko's allegations. In declarations attached to its response, both hosts explain that, in the spring of 2000, they were promoting a demonstration designed to express their displeasure with the NHL. They came up with the idea to label urinal splash guards with the letters "NHL" and then give them away to local restaurants and bars. The hosts then promoted this give-away on the air. The hosts explain in their declarations that they do not recall promoting the splash guards on May 8, 2000 (the only date listed in Mr. Palko's complaint) or regularly discussing "pissing on" individuals. Entercom does admit, however, that the hosts used the word "piss" at some unknown time during a broadcast while they were promoting the urinal splash guard giveaway and that the hosts discussed being "pissed off" or "pissed at" the NHL and the NHL's Commissioner. The hosts do not recall encouraging listeners to call in and suggest names of people whom they want to "piss on," discussing this topic, or even encouraging similar discussions on the air. Entercom does admit that the hosts "may have on occasion used the phrase 'piss on' in expressing their anger at the plight of the Buffalo Sabres," the NHL hockey organization in Buffalo.

10. Even accepting Mr. Palko's description of the broadcasts, we conclude that WLDI did not broadcast indecent material in violation of the Commission's Rules. We first find that the hosts' use of the word "piss" in conjunction with the phrases "pissed at" and "pissed off" is clearly not indecent. Both phrases are commonly used slang terms indicating or describing a sense of anger. Moreover, in the context of these broadcasts, it appears that the hosts used these phrases as a way of expressing their anger at the NHL. Contrary to the allegations in the complaint, the hosts did not use the phrases to describe or depict an excretory act. Additionally, the use of the phrases did not appear to pander or titillate, and did not appear to be presented for shock value. Thus, we decline to find that Entercom's broadcast of the phrases "pissed at" and "pissed off" violated the Commission's rules.

¹⁵ See *Letter to Mr. Peter Branton*, 6 FCC Rcd 610 (1991) ("no terms are *per se* indecent, and words or phrases that may be patently offensive in one context may not rise to the level of actionable indecency if used in other, less objectionable circumstances"), *appeal dismissed*, *Branton v. FCC*, 993 F.2d 906 (D.C. Cir. 1993). See also *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 932, para. 16, n.28 (1987) ("...we cannot list any particular language or material that will always be found indecent."), *aff'd in part and remanded in part sub. nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

11. As noted above, Entercom also admits that the hosts may have used the phrase “piss on” during the broadcasts while they were promoting the distribution of the urinal splash guards. Even assuming, again, that Mr. Palko’s version of what was broadcast is correct, we do not find that this statement is indecent. When considered within the context of the broadcast, the material is not patently offensive as measured by contemporary community standards for the broadcast medium. Specifically, we find that Entercom’s use of the phrase “piss on” was not so graphic or explicit as to be actionable. We therefore do not find this broadcast to be indecent.

ORDERING CLAUSES

12. Accordingly, for the reasons set forth herein, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, that the petition for reconsideration filed March 13, 2001 by Michael P. Palko is hereby DENIED.

13. IT IS FURTHER ORDERED THAT a copy of this MEMORANDUM OPINION AND ORDER shall be sent by Certified Mail Return Receipt Requested to Michael P. Palko, Palko Corp., 2146 Genesee Street, Buffalo, New York, 14211-1938.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau